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No. 03-1601

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF JAMES A. KAY, JR. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBERT J. KELLER
LAW OFFICES OF
ROBERT J. KELLER, P.C.
P.O. Box 33428
Farragut Station
Washington, D.C. 20033
(202) 223-2100

GLENN S. MCROBERTS
TOM MACIEJEWSKI
TRUTANICH - MICHEL, LLP
Port of Los Angeles Office
407 North Harbor Boulevard
San Pedro, CA 90731
(310) 548-0410

BARRY RICHARD
Counsel of Record
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
(850) 222-6891

ELLIOT H. SCHERKER
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Mr. Kay has been a Federal Communications Commission licensed provider of business and commercial mobile radio services since 1973. His business specializes in the installation, maintenance, design, operation and sales of air time for two-way radio communication systems in California. He has had vast experience in dealing with local governments and their zoning codes in the siting and construction of radio antennas.

As noted in petitioner's brief, Mr. Kay has challenged a resolution of petitioner City of Ranchos Palos Verdes (the City), which resolution denied him a permit to operate commercially on a pre-existing, approved amateur antenna structure, just as the City denied respondent Abrams a similar permit. Brief of Petitioner at 11 n.4. In *Kay v. City of Rancho Palos Verdes*, No. CV 02-3922-DSF (C.D. Cal May 15, 2002), the district court ruled that the resolution denying Mr. Kay's permit was not supported by substantial evidence, as required by 47 U.S.C. § 332(c)(7), the Telecommunications Act of 1966 provision that is at issue before this Court.

The district court ordered that the resolution denying Mr. Kay's permit be set aside and that Mr. Kay be allowed to use his approved amateur antenna structure for commercial purposes, subject to reasonable conditions. The court further ordered that Mr. Kay is entitled to seek an award of damages,

---

1. No counsel for a party authored this brief in whole or in part. No person or entity other than James Kay made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of all amicus briefs; their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

pursuant to 42 U.S.C. § 1983, but the damages claim and Mr. Kay's pending motion for attorney's fees under 42 U.S.C. § 1988 have been stayed until June 2005, pending the Court's decision in this case.

Having spent several hundred thousand dollars to force the City to permit that which federal law requires – and having undergone treatment at the City's hands that mirrors that which the City accorded to Mr. Abrams – Mr. Kay has a keen interest in the issue on which this Court has granted certiorari. And Mr. Kay's experience shows, if nothing else, that Mr. Abrams' case is not an isolated event. It has happened twice within the past year in one city alone, and no doubt has played out in other municipalities as well. Mr. Kay can well speak – with the voice of his experience – to the issues before the Court.

SUMMARY OF ARGUMENT

Both the City and *amicus* The National League of Cities (NLC) argue that the Ninth Circuit erroneously upheld Mr. Abrams' right to seek relief under 42 U.S.C. § 1983 (and, correspondingly, under 42 U.S.C. § 1988) because, in their view, 47 U.S.C. § 332(c)(7) is essentially borrowed from state zoning codes and such codes do not generally allow for an award of damages or for attorney's fees. Brief of Petitioners at 41-45; Brief of the National League of Cities, *etc.* (NLC Brief) at 7-23. The NLC, in particular, takes great pains to identify every supposed significant similarity between the review scheme established by the Congress in Section 332(c)(7) — which similarities come down, in the end, to the unremarkable provisions for a 30-day filing deadline, a finality requirement, and application of long-established administrative "substantial evidence" standard

— and then, in one huge leap, asserts that Section 332(c)(7) must be construed to bar relief under Section 1983 because "damages are traditionally unavailable" in state zoning appeals. NLC Brief at 7-17.

The City and the NLC are attempting to create Congressional intent from whole cloth, and then to bootstrap that purported intent into an argument that an unambiguous statute must be interpreted to bar a Section 1983 claim — when the statute is utterly *silent* on any such intent. But they cannot be heard to invent Congressional intent and to rewrite an unambiguous statute in a manner that overcomes established presumptions to the contrary.

STATEMENT OF THE FACTS

Mr. Kay adopts the Statement of the Facts in respondent's brief, insofar as that statement reflects the proceedings in Mr. Abrams' case. Because, as noted in the discussion of Mr. Kay's interest in these proceedings, the City meted out to Mr. Kay treatment quite similar to that which it inflicted upon Mr. Abrams — and did so *after* the district court in this case had ruled in Mr. Abrams' favor — a brief review of the municipal permitting process, as that process was applied on Mr. Kay's application for his permit, may be illuminating for the Court.[2]

On June 21, 2001, Mr. Kay applied to the City for a Conditional Use Permit (CUP) to allow him to use his lawful amateur antenna structure, located atop an unoccupied single-

2. The appendix to this brief comprises the district court's order and an excerpt of the record on Mr. Kay's application before the City.

family residence, for commercial purposes. App. 8. Like Mr. Abrams' antenna, Mr. Kay's antenna structure was capable of transmitting and receiving amateur and/or commercial radio frequencies, without alteration.

The City's Senior Planner reported to the City's Planning Commission at the first hearing on Mr. Kay's application that the antenna structure previously had been approved for non-commercial use and that the City's staff recommended approval of the CUP application. App. 10. The Commissioners, however, voiced their inclination to impose harsh conditions on the approval (CAR 1:39:0292) — and ultimately voted to impose many of those conditions, including, among other things: (i) reducing the approved rooftop amateur structure from five to two masts, and limiting those masts to amateur use only, in exchange for allowing commercial use of interior antennas located in the house's master bedroom (CAR 1:39:0277-78); (ii) requiring Mr. Kay (or another person) to use the presently unoccupied house as a primary residence (CAR 2:42:0372); (iii) requiring Mr. Kay "to agree to whatever shared use by third parties is requested by the City," *i.e.*, Mr. Kay would be compelled to allow others to operate commercially using antennas inside an occupied residence (CAR 2:42:0368); and (iv) precluding Mr. Kay from using his driveway so that the driveway would always be available for rare visits by service vehicles (CAR 2:42:0339).

The City Attorney eventually was moved to say that, "the more we talk about this, the more uncomfortable I am with it because . . . we are walking into a potential argument that

we are going too far," in that the Commission was "walking into a problem" — to which one Commissioner responded:

> Well, but if he is going to sue us on the grounds that he wants to really use the property for more amateur antennas, fine. So be it. Then we will find if this use maybe really is amateur. I mean my inclination is if we have to allow commercial structures all over the roof, and face more people who come in like this guy [Mr. Kay] and Abrams who lie to us and tell us that they are ham radio buffs and they are really commercial operators, my inclination would be to just deny all the applications and tell them all to go to hell and let them sue us.

(CAR 2:42:0358). App. 63-64.

Ultimately, the Planning Commission and the City Council voted to grant the CUP, but subject to a total of 22 conditions, which conditions included provisions that denied Mr. Kay the use of the rooftop antennas (and required him to remove three of the existing five antennas). App. 8-12. In granting Mr. Kay relief under Section 332(c) of the TCA, the district court applied the "substantial evidence" standard of 47 U.S.C. § 332(c)(7)(B)(iii) and held, in part:

> When the Court considers that Kay's five mast structure had, by the time of the Council's decision, been lawfully in place for at least three years, the City's purported concerns are "too little, too late." What might have justified denial of either a commercial or amateur application in 1998 cannot justify denial when that same

structure has been accepted, however grudgingly, by the community for at least three years. .... These reasons are not sufficient *today* to justify removal of three antennas.

* * * *

There is no evidence concerning which specific "health, safety and welfare" concerns would mandate removing three of five antennas, especially when the record evidences no concerns on these subjects raised during the previous several years. To the extent that those concerns relate merely to changing frequencies, the City apparently concedes its inability to regulate in this area.

* * * *

> The Court therefore finds the Council Resolution requiring Kay to remove three of his five existing antennas is not supported by "substantial evidence contained in a written record."

App. 21-23 (original emphasis). The court ordered the City to issue its permit allowing commercial use of Mr. Kay's five-mast antenna structure. *Id.* at 24.[3]

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3. As noted earlier, the court followed the Ninth Circuit's decision in this case, but the proceedings on damages and attorney's fees have been stayed pending this Court's decision.

ARGUMENT

THE TELECOMMUNICATIONS ACT'S PROVISIONS FOR JUDICIAL REVIEW OF LOCAL GOVERNMENTAL ORDERS DENYING REQUESTS FOR PLACEMENT OF PERSONAL WIRELESS SERVICE FACILITIES CANNOT BE CONSTRUED TO DENY ACCESS TO RELIEF UNDER 42 U.S.C. § 1983.

A. The Analytical Framework.

Section 332(c)(7) of the Telecommunications Act of 1996 (TCA) establishes a limited federal right to seek review of local zoning decisions on "the placement, construction and modification of personal wireless facilities." 47 U.S.C. § 332(c)(7)(A). Among other provisions, the statute requires that a decision denying a permit request for wireless facilities must be "in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). An aggrieved applicant may seek review of a permit denial (or a local government's failure to act on a permit request) in state or federal court, "within 30 days after such action," and the reviewing court "shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v).

Neither petitioners nor their *amici* dispute that Section 332(c)(7)(B)(iii) creates a federal right, or that 42 U.S.C. § 1983 may be invoked to enforce a federal statutory right. Nor does there appear to be a dispute that, as the Ninth Circuit noted, *Abrams v. City of Rancho Palos Verdes,* 354 F.3d 1094, 1096 (9th Cir.), *cert. denied,* 125 S. Ct. 26 (2004), this Court's precedent creates a rebuttable presumption that one who is vested with a federal statutory right may ordinarily seek relief under Section 1983. *E.g., Blessing v. Freestone,* 520 U.S.

329, 340-41 (1997). While the parties have addressed the "comprehensive enforcement scheme" standard set forth in *Blessing*, 520 U.S. at 341, Mr. Kay will focus on the argument, primarily advanced by the NLC, that the purported importation of state zoning law concepts into Section 332(c)(7) requires that the provision be read to bar relief under Sections 1983 and 1988, thereby overcoming the *Blessing* presumption.

The NLC purports to overcome the presumption by superficially analyzing the procedural mechanisms established by the Congress in Section 332(c)(7). NLC Brief at 8-13. The NLC notes that Section 332(c)(7)(B)(v) imposes a 30-day deadline for seeking judicial review of a local government's decision, and finds it significant that 30-day time limits "have a venerable provenance in early zoning law and continue to be widely used in state zoning law review schemes." NLC Brief at 8. Second, the requirement that review be restricted to "final" decisions, 47 U.S.C. § 332(c)(7)(B)(v), is deemed by the NLC to be significant because "[n]early every state review scheme is identical, in that virtually all allow parties 'aggrieved' or 'affected' by a 'final' state administrative zoning or permitting decision to challenge the decision in court." *Id.* at 10 (citations omitted). Finally, NLC cites the very federal right that it seeks to remove from Section 1983's ambit, Section 332(c)(7)(B)(iii)'s requirement that zoning decisions be "in writing and supported by substantial evidence contained in a written record," and asserts that this provision reflects the Congress's purported intent to import state zoning law principles into the TCA's judicial review mechanism, because state courts generally apply a "substantial evidence" test on judicial review of zoning decisions. *Id.* at 11-13.

From these utterly unremarkable similarities — as will be set forth below, each cited provision can just as easily be traced to non-zoning law — NLC asserts that "neither damages nor attorney's fees would constitute 'appropriate relief' in actions brought under § 332(c)(7)(B)(v)" because "damages are traditionally unavailable where a board of adjustment or city council incorrectly denied a permit." NLC Brief at 17. But NLC's construct is an unalloyed contrivance. Fundamental statutory construction principles bar NLC's effort to create an otherwise non-existent legislative history from extrinsic sources that have neither a relation to any statutory language nor any basis in legislative history.

B. Extrinsic Sources of Purported Congressional Intent Have No Place in Construing an Unambiguous Statute.

It is notable that NLC finds no ambiguity in Section 332(c)(7)(B)(v). NLC Brief at 7. Nor does the City. Brief of Petitioner at 21-49. How it is that the NLC can turn to extrinsic sources to elucidate legislative intent, including, for example, model codes, state zoning laws, governmental statistics and newspaper articles, is left unexplained. But "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 124 S. Ct. 1756, 1761 (2004) (citation omitted). Here, as in so many instances, it must also end there.

"[I]t is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'"

Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (citation omitted). In the absence of ambiguity in the statutory language, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (citation omitted). Thus, without statutory ambiguity, there is no basis for consulting *any* extrinsic source, even one as well recognized as legislative history.[4] Bereft of any evidence of Congressional intent to import state zoning law — and some concomitant limitations on awarding damages — into Section 332(c)(7)(B)(v), the City and the NLC turn, as previously noted, to a bewildering array of state zoning statutes and decisional law.

This Court, however, uniformly has rejected such efforts to create legislative history. *E.g.*, *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) (Congressional intent in adopting statute could not be drawn from committee report issued five years after statute's adoption, at time of amendment to statute; report "would not suffice to fix the meaning of language which that reporting Committee did not even draft"); *Western Air Lines v. Board of Equalization of South Dakota*, 480 U.S.

4. Neither the City nor the NLC rests much of their argument on the very terse legislative history that exists for Section 332(c)(7)(B)(v). See Brief of Petitioners at 26, 38 n.12, 46 n.15; NLC Brief at 7, 11. This is so, quite obviously, because that history is utterly unilluminating, at least when it comes to addressing the attempt by the City to add new provisions to Section 332(c)(7)(B)(v). The Conference Report on the 1996 amendments to the TCA shows only that the Congress viewed judicial review under Section 332(c)(7) as an "appeal," and stated that the "substantial evidence" standard was to be construed as "the traditional standard used for judicial review of agency actions." H.R. CONF. REP. NO. 458, 104TH CONG., 2D SESS. 208-09 (1996). As will be discussed *infra*, neither that history nor Section 332(c)(7)(B)(v)'s text are of any assistance to the NLC's argument.

123, 130 n.* (1987) (sparse legislative history cannot be augmented by "the creation of legislative history through the *post-hoc* statements of interested onlookers"); *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (rejecting argument that statute should be interpreted to adopt federal appellate court's interpretation of Congressional language; while "a few comments in the hearings . . . may suggest that the language bears the interpretation . . . none of those statements was made by a member of Congress, nor were they included in the official Senate and House Reports"; Court "decline[d] to accord any significance to those statements") (citations omitted). The NLC's attempt to "creat[e] . . . legislative history," *Western Air Lines*, 480 U.S. at 130 n.*, goes even farther afield.

C. The City and the NLC Cannot Demand That the Court Must Import State Zoning Law Limitations on Awarding Damages on Appellate Review into Section 332(c)(7)(B)(v).

The NLC asks the Court to import state zoning statutes that "grant local governments immunity from damages liability for zoning decisions" and case law that bars such damages, by virtue of the procedural similarities that the NLC identifies between Section 332(c)(7)(B)(v) and state zoning procedures. NLC Brief at 17.[5] The indicia upon which the

5. The statutory provisions upon which NLC relies, NLC Brief at 17 n.6, are state sovereign immunity statutes. ALA. CODE § 11-47-190 ("[n]o city or town shall be liable for damages or injury done to or wrong suffered by any person . . . , unless such injury or wrong was done or suffered through the neglect, carelessness or unskillfullness of some agent . . . of the municipality engaged in work therefor"); CAL. GOV. CODE § 818.4:

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> [a] public entity is not liable for injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit . . . or similar authorization where the public entity . . . is authorized . . . to determine whether or not such authorization should be issued, denied, suspended or revoked.

DEL. CODE ANN. TIT. 10, § 4011(b)(2) ("a governmental entity shall not be liable for any damage claim which results from * * * [t]he undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial"); IDAHO CODE § 6-904B(3):

> [a] governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct . . . shall not be liable for any claim which * * * [a]rises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke a permit, license, certificate, approval, order or similar authorization.

S.C. CODE ANN. § 15-78-60(1)-(2) ("[t]he governmental entity is not liable for a loss resulting from * * * legislative, judicial, or quasijudicial action or inaction [or] administrative action or inaction of a legislative, judicial, or quasi-judicial nature"); TENN. CODE ANN. § 29-20-201:

> all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any

(Cont'd)

NLC relies to reach this conclusion are far too slender to support it.

First, the NLC relies on the 30-day time limit for seeking relief under Section 332(c)(7)(B)(v). NLC Brief at 8-10. The NLC's exegesis of state zoning law notwithstanding, the legislative history is absolutely silent on the derivation of the 30-day time limit. The Court might as readily — and perhaps more logically — assume that the Congress derived the 30-day time limit from Rule 4(a)(1) of the Federal Rules of Appellate Procedure. That the Congress elected to use such a standard deadline hardly indicates an intent to import wholesale all aspects of state zoning law procedure into Section 332(c)(7)(B)(v).

Next, the NLC argues that the requirement of finality in Section 332(c)(7)(B)(v) "emulates state judicial review

(Cont'd)

> of their functions; statute affords "[c]omplete and absolute immunity . . . for the free exercise and discharge of the duties of . . . boards, commissions, authorities and other governing agencies.

But statutes granting sovereign immunity are of limited — if any — utility in this analysis, because sovereign immunity may not be asserted to shield a municipality or other local government from liability under 42 U.S.C. § 1983. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 166-67 (1993); *Howlett by and through Howlett v. Rose,* 496 U.S. 356, 375-81 (1990); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980). The Congress could not conceivably have imported state sovereign immunity statutes into Section 332(c)(7)(B)(v) to immunize municipalities and other local governments from liability under Section 1983, when this Court has so firmly established that no such immunity extends to such entities under Section 1983.

provisions." NLC Brief at 10. That may be true, but the provision also "emulates" 5 U.S.C. § 551(13), under which a denial of a requested license constitutes final agency action that is subject to judicial review. Once again, the non-unique requirement of finality before a court may review a lower tribunal's ruling is hardly an indicium of the intent that NLC would have ascribed to the Congress.

Finally, the NLC relies on Section 332(c)(7)(B)(iii)'s requirement of "substantial evidence" to support the local government's ruling. NLC Brief at 11-13. Once again, the NLC overreaches. The "substantial evidence" standard of review has long been established in *federal* law for judicial review of agency action. *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 491 (1951). Its inclusion in Section 332(c)(7)(B)(iii) hardly shows an intent to import a body of *state* law. For that matter, the Congress's use of what is nothing more than a well-established standard for judicial review says *nothing* about whether damages or attorney's fees should – or should not – be available when a basis for such awards is shown.

What this brief analysis readily shows is that NLC cannot ascribe to the Congress the intent to import state zoning law concepts, on which the NLC's effort to support a denial of access to Section 1983 remedies entirely depends. This Court has long looked with great care at construction arguments derived from the Congress's purported adoption of a pre-existing state enactment:

> The "general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretation of the wording * * * is a presumption of legislative

> intention * * * which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence of lack of other indicia of intention."

Yates v. United States, 354 U.S. 298, 309 (1957) (citation omitted).

In *Shannon v. United States*, 512 U.S. 573 (1994), the Court applied that principle in addressing a criminal defendant's argument that the federal Insanity Defense Reform Act, which was derived from a District of Columbia statute, silently had imported the District's requirement of a special not guilty by reason of insanity verdict. *Id.* at 580-82. The Court noted that the principle quoted above "is merely a 'presumption of legislative intention' to be invoked only 'under suitable conditions.'" *Id.* at 581 (citation omitted). And, despite a passage in the legislative history indicating an intent to adopt the District's procedure, the Court refused to engraft that procedure onto the federal act:

> We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute. On its face, the passage Shannon identifies does not purport to explain or interpret any provision of the [act]. Rather, it merely conveys the Committee's "endorsement" of the [District's] "procedure" — a procedure that Congress did not include in the text of the Act. To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative

> process. . . . "[C]ourts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point."

Id. at 583-84.

Here, there is *no* legislative history of any kind to support the NLC's attempt to read principles of state zoning law into the statute.[6] "[I]n the absence of anything in the legislative history indicating that [state decisions] were called to [the Congress's] attention, we should not assume that Congress was aware of them." *Yates,* 354 U.S. at 310. And the purported indicia of Congressional intent are simply far too

6. Contrary to the impression that is created in the NLC's brief, Section 1983 is available for aggrieved property owners whose applications have been denied by local governmental boards under circumstances that give rise to claims of a denial of due process or equal protection. *E.g., Eichenlaub v. Township of Indiana,* 385 F.3d 274, 285 (3d Cir. 2004); *Greenbriar Village L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1263 (11th Cir. 2003); *Harlen Assocs. v. Incorporated Village of Mineola,* 273 F.3d 484, 498-503 (2d Cir. 2001); *Crider v. Board of County Comm'rs of County of Boulder,* 246 F.3d 1285, 1289-90 (10th Cir.), *cert. denied,* 534 U.S. 890 (2001). The Congress is, of course, presumed to have been aware of this precedent. *E.g., Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988) ("[w]e generally presumed that Congress is knowledgeable about existing law pertinent to the legislation it enacts") (citation omitted). That presumption leads to two conclusions neither of which is helpful to the City and the NLC: that the Congress saw nothing incongruous about allowing Section 1983 relief to be sought by an aggrieved landowner in a zoning dispute, and that the Congress recognized that the admittedly stringent burden imposed upon a landowner to make a claim for denial of due process or equal protection should not be imposed upon a wireless operator who has wrongfully been denied a permit by a local governmental board.

commonplace to infer, from their inclusion in Section 332(c)(7)(B)(v), that the Congress sought thereby silently to import an entire body of state zoning law into the federal statute.

Both the City and the NLC offer perfervid visions of municipal devastation if the TCA is construed to allow Section 1983 claims to be brought on Section 332(c)(7) judicial review. They suggest that "thousands of local governments" will either suffer fiscal losses and be unable to spend appropriately on essential services or will surrender their authority to consider citizens' interests on wireless facility applications. NLC Brief at 21-23. The City invokes the menacing image of giant corporations raiding small towns' coffers to execute on "staggering" damage awards. Brief for Petitioners at 31. These dramatic stances are perhaps better suited to a Congressional committee hearing than they are to legal arguments on a question of statutory construction.

But the City itself recognizes that, at the present time, more than 90 percent of cellular tower applications are approved by local governments, usually within 60 days. *Id.* at 32 n.10. Allowing those applicants whose applications are wrongfully denied to seek damages and fees under Sections 1983 and 1988 will hardly ruin municipalities across the country. But taking away Section 1983 remedies will most surely embolden irresponsible local governments to act just as the City did on Mr. Kay's application. When an applicant must spend untold thousands of dollars to obtain that which the TCA guarantees, because a local government has acted in violation of Section 332(c)(7)(B)'s commands, the Congress cannot have intended that ordinary remedies available under federal law should be denied. There is

certainly nothing in Section 332(c)(7)(B) that supports such a draconian result, and nothing in the construction arguments offered by the City that would warrant it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT J. KELLER
LAW OFFICES OF
ROBERT J. KELLER, P.C.
P.O. Box 33428
Farragut Station
Washington, D.C. 20033
(202) 223-2100

GLENN S. MCROBERTS
TOM MACIEJEWSKI
TRUTANICH - MICHEL, LLP
Port of Los Angeles Office
407 North Harbor Boulevard
San Pedro, CA 90731
(310) 548-0410

BARRY RICHARD
Counsel of Record
GREENBERG TRAURIG, P.A.
101 East College Avenue
Tallahassee, FL 32302
(850) 222-6891

ELLIOT H. SCHERKER
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500

Counsel for Amicus Curiae

APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JULY 12, 2004 AND FILED JULY 13, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 02-3922-DSF(RZx)

JAMES A. KAY, JR, JAMES A. KAY, JR. dba LUCKY'S TWO WAY RADIO, COMMUNICATIONS RELAY CORPORATION, a California corporation,

Plaintiffs and Petitioners,

vs.

CITY OF RANCHO PALOS VERDES, a Municipality, CITY OF RANCHO PALOS VERDES PLANNING COMMISSION and its members, FRANK LYON, LARRY CLARK, JON CARTWRIGHT, THOMAS LONG, CRAIG MUELLER, THEODORE PAULSON, and DONALD VANNORSDALL; CITY OF RANCHO PALOS VERDES CITY COUNCIL and its members, JOHN MCTAGGART, DOUGLAS STERN, PETER GARDINER, BARBARA A. FERRARO, and DOUGLAS STERN,

Defendants and Respondents.

Appendix A

OPINION AND ORDER AFTER COURT TRIAL

I. INTRODUCTION

Petitioner James A. Kay ("Kay")[1] seeks rulings from this Court in what he has described as three general areas: (1) whether the Conditional Use Permit decision should be vacated for lack of substantial evidence; (2) whether the Respondents' actions violated his constitutional rights; and (3) whether the Respondents' new antenna ordinance is invalid.

A. *The CUP Decision*

Kay seeks an order vacating a Conditional Use Permit ("CUP") decision adopted by Respondents, City of Rancho Palos Verdes, et al. (the "City") in alleged violation of the Telecommunications Act of 1996 ("TCA"), and a writ of mandate requiring the City to permit Kay to operate commercially using an existing amateur antenna structure. Kay is licensed by the Federal Communications Commission ("FCC") for both amateur and commercial operations, and the antenna structure is capable of transmitting and receiving both amateur and commercial radio frequencies.

The question presented by Kay is whether the City can bar Kay from using a lawful amateur antenna structure where the only difference between amateur operations and the proposed commercial operations is the radio frequency

1. Kay sues on his own behalf and "dba Lucky's Two Way Radio." Communications Relay Corporation, an entity about which this Court has received no information, is also named as a Plaintiff.

Appendix A

utilized. Kay relies almost exclusively on the unpublished decision of another judge of this Court, which vacated a CUP decision in what Kay contends is an almost identical case: *Abrams v. City of Rancho Palos Verdes*, CV 01-9071-SVW (Order dated and filed January 9, 2002) ("*Abrams*").[2]

B. *The Claimed Violations of Kay's Constitutional Rights*

Kay also contends the City violated his constitutional rights. He asks this court to "delve into the administrative record, and beyond, to see for itself the animosity, bias and sometimes outrageous abuse of power by City Planning Commissioners and Council Members." Kay admits the CUP decision "naturally contains few express statements of bias, discrimination or improper motives, elements required to prove Kay's other claims." Kay's Opening Brief at 2. In order to establish his claims, Kay sets forth what he contends are "some of the more egregious acts and comments of the City," asking the Court to conclude "that the City falsely accused Kay of lying, abhorred Kay and his antenna structure, and openly used the CUP process to hold Kay hostage to the City's often absurd, and in some cases unconstitutional, demands (e.g., forcing him to rent his property)." Kay's Opening Brief at 3.

2. Though this Court (unlike the Ninth Circuit) has no local rule prohibiting the citation of unpublished decisions, none is necessary, as district court opinions have no binding effect.

C. *Validity of Ordinance 374U and the New Antenna Regulations*

Finally, Kay contends that Urgency Ordinance 374U ("374U"), passed March 11, 2002, is invalid and violated numerous statutory and constitutional rights because its retroactive provisions allegedly affected only Kay. He further argues 101 F.C.C. 2d 952, 50 Reg. 38, 813 (1985) ("PRB-1") preempts the City's amateur antenna regulations, as amended by 374U and applied to Kay, because the City failed reasonably to accommodate his amateur radio operations, and the regulations do not represent the minimum practicable means to accomplish the City's legitimate goals. In doing so he asks the Court to rely on expert testimony given after the decision was made. Both Kay's expert and the City's expert agreed that limiting Kay to two antennas would not be a reasonable accommodation. 374U, however, allows an applicant to request additional antennas, and the City agrees Kay would be allowed at least five. City's Trial Brief at 46.

D. *The Trial*

The TCA provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof . . . may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). The parties agreed to a Court trial in the administrative record as supplemented by expert testimony[3]

3. The Court initially permitted expert testimony as to certain issues. The Court did not rely, however, on any of the proffered testimony in reaching its decision.

which was held May 11, 2004. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the following constitutes this Court's findings of fact and conclusions of law.

II. FACTS

A. *Events Preceding Approval of the Five Mast Antenna for Amateur Use*

In 1994 Kay purchased a two-story, single-family residence at 26708 Indian Peak Road in the City of Rancho Palos Verdes. AR 3:66:792 [lines 11-12].[4] The neighborhood is single-family residential. AR 1:30:115. It is undisputed that either Kay nor anyone else has lived at the property since Kay purchased it. *See* AR 3:66:792 [lines 18-24]. When purchased, the Property had two rooftop antennas. AR 3:66:792 [lines 12-14]. Kay contends he used the antennas for amateur purposes, while the City contends he also used them for commercial purposes.

On December 7, 1994, Kay wrote a letter to the FCC authorizing use of commercial frequencies for which he was licensed, including 852.9625 MHz, at a base station at his property in Rancho Palos Verdes and at the Getty Museum Center. AR 4:76:1182. Kay contends he "forgot" about this letter. *Id.* at 1164.

In January 1997, the City sent Kay a notice of violation relating to the use of his rooftop antennas for commercial

4. References to the certified administrative record are indicated by "AR volume no.:tab no.:page no."

purposes without a CUP. AR 2:56:432 [lines 25-28]. Kay denied any commercial use. AR 2:56:433 [line 9].

In April 1998, Kay installed in an upstairs bedroom antennas for commercial use. AR 2:56:433 [line 20] - 434 [line 2]. Kay contends in his trial brief that he believed the operation of interior antennas was permissible without approval because they were "located in the upstairs master bedroom, out of public view, and had no effect on surrounding properties." Kay's Opening Brief at 8.[5] Kay asserts the indoor antennas were connected to their own transmitter and the rooftop antennas remained connected to their own amateur band radio facilities, i.e., they were separate communications facilities. AR 3:66:793-94 [20-28].

By August 1998, Kay had installed three additional antennas on his roof, for total of five rooftop antennas.[6] On August 5, 1998, Kay filed an application with the City for approval of the "existing antenna array" on the roof for *non-commercial* purposes. *See* AR 1:30:114 [first paragraph]. Staff approved Kay's application on October 22, 1998. *See* AR 1:30:114 [first paragraph]. On November 4, 1998, before the 15-day appeal period was to expire, the City Council adopted Urgency Ordinance No. 341U, placing a moratorium on the processing of all antenna applications,

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5. Though the brief cites to Kay's declaration for support, the declaration does not contain such an assertion.

6. It is not clear when these antennas were first erected. Kay contends that he replaced the original antennas with the five mast structure at issue "shortly" after purchasing the house. Kay's Opening Brief at 7.

including Kay's. AR 2:43:376 [¶¶ 1 and 2]. Kay suggests he was the only person who had had his Site Plan approved and was simply waiting for it to become final. The City contends one or two other applications also were stayed by the moratorium. Fox Depo., City's Trial Brief, Ex. B, at 71:15-18.

On March 16, 1999, the City adopted Ordinance No. 345, amending its amateur and commercial antenna regulations. On April 16, 1999, the moratorium was lifted and the new regulations went into effect. The ordinance clarified the definition of "antenna support structure" as a vertical structure. Rancho Palos Verdes Municipal Code ("RPVMC") § 17.96.120. The ordinance also created a category of amateur antennas exempt from the City's permitting requirements, specifically: "[o]ne (1) building mounted antenna assembly which does not exceed twelve feet (12) in height . . . and which contains radiating elements, each of which does not exceed six (6) feet in length." RPVMC § 17.76.020(C)(3)(c)(ii). The term "antenna assembly" was defined in the ordinance as "the totality of equipment used to support reception by or transmission from an antenna. It includes the antenna(s), . . . antenna support structure(s), and any radiating elements. . . ." RPVMC § 17.96.087. Thus, the ordinance exempted from City regulation one rooftop mounted vertical antenna support structure not exceeding twelve feet in height with horizontal radiating elements not exceeding six feet in length.

At some point before June 2001, Kay mounted a *horizontal* antenna support structure from which his five antennas would extend. *See* AR 1:2:3 [project description]; AR 1:36:210 and 212. The Code at the time also provided

that two amateur antenna support structures were allowed per lot. RPVMC § 17.76.020(C)(1)(a).

Kay contended that because his antenna support structure was horizontal, he could add as many vertical poles as possible as long as they did not exceed twelve feet in height. *See* AR 1:34:208. Because Kay had attached five vertical poles to his horizontal antenna assembly before Ordinance No. 345 was adopted in March 1999, the City notified Kay on July 7, 1999 that he was "technically correct" that those five vertical poles, if used only for amateur purposes, were exempt from the City's permitting requirements. AR 2:56:438.

B. *Kay's CUP Application and the Planning Commission Actions*

On June 21, 2001, Kay applied for a CUP ("CUP 230") to use his existing rooftop amateur antenna structure for commercial purposes. AR 1:2:3-40.

The initial Staff Report from Senior Planner Fox ("Fox") to the Planning Commission, dated October 23, 2001, presented proposed findings and recommended that CUP 230 be conditionally approved. AR 5:89:1386-1394. The "Conclusion" of the Report states: "Based on the discussion presented above, Staff believes that all of the required findings for the approval of the proposed project can be made. In addition, Staff believes that the conditional approval of the proposed project is consistent with the City's Wireless Communications Antenna Development Guidelines and the Telecommunications Act of 1996. Therefore, Staff

recommends adoption of P.C. Resolution No. 2001-__, conditionally approving Conditional Use Permit No. 230." AR 1:30:125.

At the October 23, 2001 Planning Commission meeting, the commissioners, based on information in the Staff Report, concluded that Kay had lied about his commercial use of the antennas. *E.g.*, AR 1:32:195.

On November 7, 2001 Kay hand-delivered a letter to Fox referencing "Conditional Use Permit No. 230 and Environmental Assessment No. 744 - 26708 Indian Peak Road." The letter attaches "corrected project plans" which Kay asserted had been corrected "to accurately reflect the project as it was originally described on the site plan, and as it currently exists on the project site."[7] The letter further states: "It is our understanding that the 20 existing antenna elements are permitted by right, and that this correction will not materially change the nature of the project as originally proposed, which requests to convert the 20 existing roof-mounted antennas to be used for commercial purposes." AR 1:33:205.

The November 13 Staff Report again recommended that Kay be permitted to use his five mast antenna structure for commercial purposes, while maintaining the position that commercial operations were conducted at the property. AR 1:37:217. The report also notes the addition of some antenna masts. The City planners resubmitted a draft resolution granting Kay's CUP application for the five mast

7. Kay admitted, Kay's Opening Brief at 35, that Kay's actions in erecting the additional masts were "provocative."

structure, but added a new condition (condition No. 12) that Kay remove the later added antenna masts. AR 5:90:1403.

At the November 13, 2001 Planning Commission meeting Fox advised the commission that the five mast structure had been permitted for non-commercial use, and again recommended approval of the CUP. AR 1:39:231-32. City Attorney Lynch advised of a potential problem under the Telecommunications Act and PRB-1. AR 2:42:358.

On November 15, 2001, the Planning Commission issued Resolution 2001-43, "A Resolution of the Planning Commission of the City of Rancho Palos Verdes Approving Conditional Use Permit No. 230, Thereby Approving the Commercial Use of Interior Antennae and Related Support Structures and Equipment on the Site of a Single-Family Residence Located at 26708 Indian Peak road in the *Grandview* Community" (the "PC Resolution"). The PC Resolution addresses only the five mast structure.[8] AR 2:43:378-379. Though framed as an "approval," Kay correctly notes that the PC Resolution effectively denied commercial use of his *outdoor* antennas and required him to remove three of the previously approved "amateur use" antennas from his roof as a condition of being permitted to use his interior antennas commercially. AR 2:43:379 (Finding 1 B), 384-388. The PC Resolution posed a total of 22 conditions to commercial use.[9] *Id.*

8. While Kay repeatedly impliedly suggests there was some impropriety in this failure, he has submitted nothing to suggest that he properly amended the application or otherwise was entitled to have the City consider these additional antennas.

9. Kay's contention that all conditions had to be accomplished (Cont'd)

C. *Kay's Appeal and the City Council's Actions*

Before the City Council received Kay's appeal brief, AR 2:56:416-461, the *Abrams* decision was issued. On March 11, 2002, before the Council's first full hearing on Kay's appeal, the City enacted Urgency Ordinance 374U, amending its antenna regulations. RPVMC § 17.76.020 ("374U"); AR 3:64:641-43.

At the March 19, 2002 City Council meeting Fox recommended that the five mast structure be approved. The Council continued to question Kay's credibility. AR 4:69:993.

The March 25, 2002 Memorandum from the Director of Planning recommended that the City modify the PC Resolution to permit Kay's commercial use of the five mast structure based on the City's previous indication that it was exempt from 374U, AR 4:72:1023, ¶ 1, but continued to question Kay's credibility. The Report included a section in its "finding of facts" which concluded, "Accordingly, the City Council finds that the appellant's arguments — that these additional vertical support structures and antenna are amateur antennae that previously were exempt from City regulation and that the roof-mounted antenna support structure and array has not been materially altered — to be without merit or credibility." AR 4:72:1034-35.

(Cont'd)
within 90 days, Kay's Opening Brief at 17, is incorrect. The Conditions of Approval he cites for this proposition state only that Kay must, within 90 days, confirm in writing that he has read and understood these conditions, and agrees to them — not that he has comp'eted them. AR 2:43:384.

At the March 25, 2002 City Council hearing, the City Attorney agreed with Kay's assertions that transmissions with Getty had not been activated. There was, however, some form of agreement between Kay and Getty. AR 4:75:1129.

On April 16, 2002, the City Council issued Resolution 2002-27, "A resolution of the City Council of the City of Rancho Palos Verdes Approving Conditional Use Permit No. 230, Thereby Approving the Commercial Use of Interior Antennae and Related Support Structures and Equipment on the Site of a Single-Family Residence Located at 26708 Indian Peak Road in the Grandview Community (the "Council Resolution"). AR 5:84:1329-1344.

III. ANALYSIS

A. *The Telecommunications Act*

When enacting the TCA, Congress unquestionably intended to preserve the traditional local control over land use regulations. 47 U.S.C. § 332(c)(7)(A) provides: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." Nearly every case addressing claims similar to Kay's has found in favor of the government agency denying the request. Indeed, the only authority Kay was able to cite in support of his position was *Abrams*, which Kay must, and does, admit is not binding, and which the City contends was based on different facts in any event.

Kay asks this Court to find that the decision to deny commercial use of a pre-existing amateur antenna structure was not supported by substantial evidence as required by 47 U.S.C. § 332(c)(7)(B)(iii).[10] He does not contend that his antenna structure is aesthetically pleasing, or even that it conforms to the City's present regulations. He contends only that the City cannot justifiably raise the issue of aesthetics now, when Kay's only request is to change the frequency of his transmissions from an already existing lawful structure. The Court agrees.

1. *Burden of Proof*

Circuit courts addressing this issue have thus far been consistent in their determination that the burden is on the applicant to show that the local government's decision is not supported by substantial evidence. *E.g., Voicestream Minneapolis v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003); *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 63 (1st Cir. 2001). The Ninth Circuit as not yet addressed the issue. The only district court in California to resolve the issue in a reported decision has also held that the burden rests with the party challenging the local decision. *See MetroPCS, Inc. v. City and County of San Francisco*, 259 F. Supp. 2d 1004, 1009-1010 (N.D. Cal. 2003). This Court sees no reason to depart from this substantial and persuasive body of authority. Therefore, the

10. As the Court finds in favor of Kay on this issue, it declines to decide whether the City also "unreasonably discriminate[d] among providers of functionally equivalent services" in violation of the TCA. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I).

Court concludes that Kay bears the burden of establishing that the Council's resolution is not "supported by substantial evidence contained in a written record."

2. *The "Substantial Evidence" Standard of Review*

In the context of the TCA, "[t]he 'substantial evidence' standard of review is the same as that traditionally applicable to a review of an administrative agency's findings of fact. Judicial review under this standard . . . is narrow." *Second Generation Props. L.P. v. Town of Pelham*, 313 F.3d 620, 627 (1st Cir. 2002) (citation omitted). "The substantial evidence test is highly deferential to the local board." *Id.* "The City's decision will be considered supported by substantial evidence if the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *MetroPCS*, 259 F. Supp. 2d at 1010, citing *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1218 (11th Cir. 2002). This standard requires "more than a scintilla of evidence but less than a preponderance" *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1164 (S.D. Cal. 2000) (citation omitted). "The court must review the entire record as a whole in making its determination, including all evidence unfavorable to the agency's position." *Id.* (citation omitted). "If any one ground provided by the City is supported by substantial evidence, the [City's decision] is proper." *MetroPCS*, 59 F. Supp. 2d at 1010. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Second Generation Properties*, 313 F.3d at 627 (citation omitted).

In evaluating the City's decision here, "the [City's local] zoning laws govern the weight to be given the evidence." *MetroPCS*, 259 F. Supp. 2d at 1010 (citation omitted). "The City's interpretation of its own zoning laws 'is entitled to great weight and should be respected by the court unless it is clearly erroneous or authorized.'" *Id.*, citing *Carson Harbor Village, Ltd. v. City of Carson*, 70 Cal. App. 4th 281, 290 (1999).

3. *The Council Resolution Is Not Supported by Substantial Evidence*

Kay's claim for violation of the TCA (and for a writ of mandate under California Code of Civil Procedure section 1094.5) depends on Kay's ability to prove that the Council Resolution was not supported by substantial evidence. Though it is unusual to consider this issue in the context of a municipal action "approving" a CUP with conditions rather than denying the CUP altogether, the City has suggested no reason that the analysis should be substantively different. Therefore the Court simply considers whether the Council Resolution, as issued, is supported by "substantial evidence contained in a written record."[11]

Kay contends that there is no adverse impact associated with operating on commercial frequencies using existing amateur antenna structures, and thus no substantial evidence

11. As alluded to previously, Kay sought to provide additional evidence by way of expert testimony, and the City objected. The Court admitted the expert testimony, but did not find it necessary or appropriate to rely on that testimony in reaching its decision.

to support any decision barring such use. The City contends: "Kay's use of his rooftop antennas for commercial purposes *long before* he applied in 2001 for a CUP is critical to determining whether the City properly conditioned the CUP on the removal of three of the five antennas. . . . Had the City known that Kay was really using the antennas for commercial purposes from the outset . . . the City would have required Kay to apply for a CUP before erecting those antennas. Thus, the City's requirement here that Kay remove three of his five antennas is *no different than if Kay had originally applied to erect five antennas for commercial use, and the City permitted only two*." City's Trial Brief at 21. Thus, the City does not dispute that Kay's five mast antenna structure was approved for amateur use before Kay filed his CUP application.[12] It simply contends that it should be placed, for purposes of this Court's analysis, in the position it would have been in if it had known at the time of Kay's original application, that he intended to use the five antennas for commercial purposes.

But the City provides no legal support for this position. Even if the Court were to assume that Kay lied — or that the City's belief that he lied was reasonable — that does not, *a priori*, suggest that the City can retract its prior approval of the five mast structure. Neither body of law — that relating

12. Kay contends that his actual CUP application was for use of a 20-mast structure, including 15 masts erected after June 1, 2001. Kay has not established this to the Court's satisfaction. In any event, the City did not consider these additional masts in its analysis and "findings of fact" when it reviewed Kay's application. *See, e.g.*, AR 2:43:378-79 [Section 1(A)]. The Court therefore addresses the approved five mast structure.

to amateur use of antennas or that relating to commercial use — even suggests that veracity of the applicant is a relevant factor. The Court has not been cited to any authority concerning PRB-1, which applies to applications for amateur use, that discusses the veracity of the applicant or the impact of the applicant's actual or potential intention to use the antennas for commercial purposes in the future. Therefore, it is not clear why the City's decision would have been different.

While the Court can understand the City's concern that, in the wake of *Abrams*, it now must consider applications for amateur antenna structures even more carefully, there is no basis to conclude that the Court can retroactively imprint that concern onto **this** decision — at least as it relates to the five mast structure.

The City urges that the Court "decline Kay's invitation to follow *Abrams* without acknowledging the factual distinctions that compel a different result." City's Trial Brief at 21. The Court agrees that there are significant differences between this case and *Abrams*, and fully recognizes that *Abrams* is not binding. In *Abrams*, for example, Judge Wilson accepted the City's contention that 12.5 feet of Abrams' antenna violated the original permit. Here, the City claims it would never have allowed Kay to put *five* commercial antennas on his roof had it known of his true purpose (in other words he only received a permit for those five because he intended to use them for amateur purposes). The findings in *Abrams* regarding the alleged improper use, however, show a stark contrast to the facts here. Regarding

the City's contention that it could require Abrams to reduce the size of his antenna structure, Judge Wilson found:

> The first reason indicated above, that the use contradicts the original purpose of [the] 1990 permit, is immaterial. The record does not indicate that the denial of the CUP would require Plaintiff to remove the antenna, or reduce the height to 40 feet, so the denial of the permit would only be an act of spite by the community.

Abrams at 10:25 to 11:3.

Here, the City is taking precisely the position that it apparently *failed* to take in *Abrams* — that it *would* require Kay to limit his (visible) use of antennas to the amateur use previously allowed, i.e., two antennas.

The Court is not persuaded, however, by the City's argument that "[t]he real question is whether the City originally could have permitted erection of only two rooftop antennas for commercial purposes." City's Trial Brief at 21. The Court instead chooses to do what it believes the law compels — decide this case based on the record before it, i.e., the administrative record before the City Council in August 2001.

The Court now turns to that administrative record to determine the reasons for the Council Resolution to the extent that it requires Kay to remove three of his five antennas — and to determine whether those reasons are supported by "substantial evidence contained in a written record."

The City groups the findings supporting the Council Resolution into three categories. First, the City contends that its "findings were designed largely to retain the residential character of the surrounding single-family neighborhood and to reserve aesthetics atop the Palos Verdes peninsula." City's Trial Brief at 17. The City correctly notes that "[n]othing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes." *Aegerter v. City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999). Moreover, "aesthetic harmony is a prominent goal underlying almost every such code." *Id.* The City of Ranchos Palos Verdes is no exception. The City cites to code provisions designed to address aesthetics. *E.g.*, *RPVMC* § 17.76.020(A)(11)(a)(ii). With these concerns in mind the Council Resolution contains the following findings: (1) there was inadequate foliage to "screen any antenna support structures or antennae on the roof of the structure from view from any surrounding residences . . . ," thus requiring reduction to two masts to "maintain the appearance of the structure as a single-family residence, and to integrate the commercial use into the residential neighborhood," AR 5:84:1332 [Section 1B]; (2) "conversion of the existing antennae to commercial use constitutes intensification of the use that benefits the applicant financially but . . . does not offset the visual impacts of the antenna array upon the surrounding neighborhood," AR 5:84:1333 [Section 1D]; (3) the conditions imposed are meant to prevent the commercial use of the property from exacerbating the substandard condition of the residence, and ensure use consistent with the General Plan, AR 5:84:1334 [Section 1F]; (4) the conditions imposed are meant to protect the "health, safety and general welfare," AR 5:84:1334-35

[Section 1H]; and (5) the removal of the antennas will "balance the aesthetic impacts of the antennae upon the neighborhood with the applicant's financial benefit." AR 5:84:1336 [Section 4].

The Court declines to adopt Kay's suggestion that the City's obvious disdain for the proliferation of antennas detracts from the reasonableness of its decision. Indeed, all aesthetic requirements arise from the relevant agency's dislike — or that of its constituents — for certain visual features, and preference for others. That the City Council members heed the reasonable desires of residents to maintain certain standards establishes that they are acting as voters expect elected public officials to act. This should not result in blanket condemnation by the Courts. It is only proper for a court to intervene when the City impermissibly crosses the boundaries established by the TCA. *See* 47 U.S.C. § 332(c)(7)(A) and (B).

The Court also declines Kay's invitation to conclude that the "real reason" the Council denied his request was due to hostility toward Kay; to punish him for "fighting City Hall"; to punish him for adding 15 additional masts to his structure,[13] to punish him for referring to his litigation with the City as "cheap theater" in a press interview, etc. While these factors most certainly did not endear Kay to his neighbors or the

13. Kay claims that after he realized the City was intent on preventing his commercial operations, he decided to "maximize his amateur station and experiment with it," but the City then responded by changing the law and making it retroactive to render those masts illegal, after-the-fact. The Court does not accept Kay's characterization in light of the record before it.

Council members, as discussed below, the Court believes there was "substantial evidence contained in a written record" of valid aesthetic reasons for denying Kay's request *that would have been sufficient had Kay not already received permission to have the five mast structure*. As noted above, however, the Court believes it must consider the record as a whole as it stood at the time Kay applied for CUP 230 -- that is, with the approval of the five mast structure as it then existed. When the Court considers that Kay's five mast structure had, by the time of the Council's decision, been lawfully in place for at least three years,[14] the City's purported concerns are "too little, too late." What might have justified denial of either a commercial or amateur application in 1998 cannot justify denial when that same structure has been accepted, however grudgingly, by the community for at least three years. (As one planning commissioner noted, there are other methods of code enforcement that may be available to address these matters.) These reasons are not sufficient *today* to justify removal of three antennas.

Kay contends that the foliage (and the degree to which it does or does not address the City's aesthetic concerns) is the same regardless of whether the lawful five mast structure transmits and receives amateur or commercial frequencies. Kay is correct. There is no indication in the record that the foliage existing at the time Kay's five mast structure was found to be exempt had died or otherwise changed. In the absence of such evidence, the record does not contain "substantial evidence" to support the Council's finding. (Even

14. As previously indicated, it is not clear when the five mast structure was erected, but it was no fewer than three years before the Council Resolution and two years before the PC Resolution.

with such evidence, the more appropriate remedy might have been a condition that it be replaced considering that the five mast structure was exempt.)

There is no indication, either in the record or the City's Trial Brief, of what the Council meant by "intensification of use" -- at least as it would relate to any visual impact different from that existing in June 1999, when the City confirmed that Kay's five mast structure was exempt. This finding is vague and unsupported.

There is no evidence concerning which specific "health, safety and welfare" concerns would mandate removing three of five antennas, especially when the record evidences no concerns on these subjects raised during the previous several years. To the extent that those concerns relate merely to changing frequencies, the City apparently concedes its inability to regulate in this area. See AR 5:84:1337-38 [Section 5C].

As to "balancing the aesthetic impact with financial gain," there is no explanation in the record as to what legitimate concerns the City might have been addressing, or how the balancing might be accomplished. For example, it's not clear whether more antennas would be allowed if Kay could make a *lot* of money from them (and therefore his loss would be great), or if he could make only a small amount from them (and therefore his loss would be so minimal that the City's concerns about aesthetics would weigh in the City's favor). In any event, considering that the aesthetics, such as they were, had already been in place for years, there is no particular logic in allowing the City to change the rules *as to*

existing lawful antennas simply because Kay now might profit from those antennas. No evidence supports this finding.

The City's next category of findings relates to Kay's use of the residence as an "antenna facility." City's Trial Brief at 18. This concern is closely tied with the City's third category: that Kay lied when he stated that he did not use his exterior antennas for commercial use. City's Trial Brief at 19. Notably, Section 2 of the Council Resolution focuses on Kay's commercial use and lack of credibility. AR 5:84:1335 [Section 2]. Despite the amount of space devoted to this issue in the briefs -- and Kay's vehement protestations of honesty, supported mostly by his own declarations, this Court is unable to conclude whether Kay has always been open and honest" with the City with regard to when his commercial use began. As indicated previously, however, the Court cannot find any legal support for denying Kay's application, even if he had intentionally misled the City on this issue.

The Court therefore finds the Council Resolution requiring Kay to remove three of his five existing antennas is not supported by "substantial evidence contained in a written record."

B. The Improper CUP Decision Warrants A Writ of Mandate Under California Code of Civil Procedure § 1094.5.

Review of planning commission proceedings regarding a conditional use permit is appropriate under Code of Civil Procedure section 1094.5. *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546 (1972). As with the TCA, the standard of

review is "whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision . . . in light of the whole record." *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 514-15 (1974).

Therefore, for the reasons described above, a writ of mandate shall issue requiring that the City permit commercial use of Kay's five mast antenna structure subject to appropriate conditions.

C. Kay Has Not Established That His Constitutional Rights Have Been Violated.

1. Kay Has Not Proved a Violation of His Right to Substantive Due Process

Assuming *arguendo* that Kay has a constitutional basis for his claim,[15] Kay is correct that substantive due process may be violated where a municipal body acts arbitrarily or irrationally in making its decisions. *See Airtouch Cellular*, 83 F. Supp. 2d at 1170 (the principle of substantive due

15. The City objects to Kay's substantive due process claim on the grounds that any argument that the City Council retaliated against him for exercising his First Amendment rights preempts a substantive due process claim. As the Court rejects Kay's substantive due process claim on other grounds, it need not reach the issue.

For the same reason, the Court need not determine whether Kay seeks constitutional redress for property infringement generally, for which there is a constitutionally protected right, or only for his CUP permit for commercial antennas, for which the City argues there is not.

process assures property owners of the right to be free from arbitrary or irrational zoning actions); *Omnipoint Communications, Inc. v. Penn Forest Tp.*, 42 F. Supp. 2d 493, 508 (M.D. Pa. 1999) (substantive due process violation may occur if the zoning authorities are "motivated by 'bias, bad faith, improper motive, racial animus, or the existence of artisan political or personal reasons'").

Kay points to comments of City planning commissioners, the City Attorney and City Council members that allegedly demonstrate a lack of fairness.

Kay first points to Planning Commissioner Long's statements: "I mean my inclination is if we have to allow commercial structures all over the roof, and face more people who come in like this guy and Abrams who lie to us and tell us that they are ham radio buffs and they are really commercial operators, my inclination would be to just deny all the applications and tell them all to go to hell and let them sue us." AR 2:42:358. City Attorney Lynch responded: "Which undoubtedly will happen. OK. I will be quiet now. I have said this every way I can think of." *Id.*

Commissioner Long's statement appears to be a reaction to the *Abrams* decision, which was clearly unpopular with the Commission and City Council. Commissioner Long's comment is not at all irrational in light of the potential impact of *Abrams*. While Congress made clear in the TCA that it wished to reserve to local agencies the right to make aesthetic decisions when presented with applications for commercial antenna use, 47 U.S.C. § 332(c)(7)(A), PRB-1 makes clear that governments must consider the great benefits conferred

on the public by amateur radio operators when considering their applications. PRB-1 at ¶ 10. This provision *may* allow those in the telecommunications business to avoid a certain degree of regulation by purporting to erect amateur antennas while fully intending immediately to convert them to commercial use. The proliferation of unsightly antennas[16] is limited to some degree by their non-commercial use. There simply is a limit to how many antennas (or how high an antenna) one residence needs (or would want) for amateur use. If one is able to make money from antennas, however -- so much money that it makes economic sense to buy a home in a well-to-do residential neighborhood to be used simply as a structure on which to place antennas -- "the sky is the limit," so to speak. It was not irrational for the commissioners to fear that Abrams, coupled with the willingness of applicants to "misrepresent" their intentions (or legitimately change their minds), would effectively defeat Congress' recognized intention to preserve the ability of local governments to address the aesthetic concerns of the vast majority of their citizens.

Elsewhere, Kay objects to Council Member Gardiner's comment in response to the arguments of one of Kay's representatives: "I've heard enough snake oil." AR 4:69:1003. It's not clear from the record to what this referred, but it may have been the obviously troublesome position taken by Kay's counsel that Kay could place "10, 20, 30" or a virtually unlimited number of amateur use antennas on his roof so long as each was under 12 feet tall. AR 4:69:1001.

16. The Court assumes there's no real dispute that such antennas are rarely considered a positive addition to a residential neighborhood.

Later, Gardiner discusses the concept of "substantial evidence" and that it is expected that legislators will consider the views of their constituents, and states: "I think we have a right under the Telecommunications Act to simply say take the stuff off the exterior. Now if you want to put inside [sic], that's your choice. If you want to find greener pastures. That's your choice, but I believe we can say take the antennas off the exterior of the house . . . . So I would say that we have a basis, a reasonable basis, for saying take all the antennas off the roof." AR 4:75:1139. This was not a totally unreasonable interpretation of the TCA in light of section 7(A) and the substantial circuit authority upholding the ability of local government to regulate aesthetics, and does not prove irrationality, bias, or punitive intent.

Finally, Council Member Clark stated: "Well, I'll tell you the difficulty I have with that is, this is a residential community. It's a residentially zoned community and quite frankly, this ruse by Mr. Kay with the City doesn't fly with me one iota. And by the way, I'm not impressed with his comments to the press, that he considers this cheap theater . . . . If you think that impresses the Council, it doesn't." AR 4:75:1126. Mayor Pro Tern Stern follows this remark with: "We are. We are, Larry." *Id.*

Council Member Clark frankly stated his appropriate concerns for maintaining the residential nature of the community. These are precisely the concerns relegated to local governments under the TCA and the case law interpreting it. Clearly, Council Member Clark did not believe Kay had been honest with the City. The Council's concerns with Kay's veracity *in this regard* have a substantial basis in

fact.[17] The Court concludes, based on the record, that the belief of the commissioners and council members that Kay had intended to use his antennas for commercial purposes as early as the date on which he applied for amateur use was reasonable. Their concerns in that regard were not irrational, nor did they arise from bias. The concerns arose from the information before the Council members. While attempting to rebut "unfounded attacks on [his] credibility, Kay made clear his long existing interest in commercial use. He has been active in the telecommunications industry since 1973. AR 4:76:1160 (Applicant James A. Kay, Jr.'s Supplemental Declaration and Exhibits in Support of Conditional Use Permit). Kay has operated telecommunications businesses since 1977. *Id.* These businesses specialize in, *inter alia*, sales of air tame for two way radio systems. He has transmission facilities throughout Southern California. *Id.* "Shortly" after purchasing the Indian Peak residence, Kay placed three additional antennas on his roof (for a total of five). Kay's Opening Brief at 7. In December 1994 he signed a letter that would have authorized the Getty Trust to broadcast from his residence. AR 4:76:1182. Kay leased space on his indoor antennas to at least two businesses. AR 4:76:1161. At the time he was applying for CUP 230, Kay had "a large number of *pending* commercial applications with the FCC." *Id.* Most of the applications sought permission to broadcast from the

17. The Court distinguishes the question of whether Kay was truthful concerning the date on which he began commercial operations, and whether those operations were inside the house or outside, from the question of whether Kay misrepresented his intentions when he stated he intended to use the additional antennas for amateur purposes. It is this latter subject that Long and Clark appear to be addressing.

Indian Peak property as well as other locations. *Id.* He admitted he might want to use the Indian Peak property for those licenses. *Id.* Kay contends he purchased the Indian Peak property as a "second residence" and has been fixing it up, but it is unquestioned that no one has lived at the residence since its purchase by Kay. Kay's representative admitted at the November 13, 2001 public hearing that Kay wanted all 20 antennas to remain on the roof for commercial use. AR 1:39:236-37.

With respect to the comments of City Council members,[18] Kay bases his due process claim on allegations unsupported by the record. For example, Kay baldly alleges that City officials "allowed Kay's legal acts and statements to provoke them into abusing their powers, to the point that they ignored advice from experienced City planners and their own City Attorney (and Judge Wilson's ruling *Abrams*) in their drive to retaliate against Kay." Kay's Opening Brief at 36-37. However, the other statements by City Council members suggest an ongoing debate over the merits of Kay's application rather than any arbitrary or irrational animus toward Kay. City Council Member Gardiner attempted to determine what the City Council's obligations were under

18. Kay has cited only isolated statements of City officials to substantiate his claim of due process violations. This Court agrees that the City Council's decision on Kay's CUP application, not the Planning Commission's decision, is under review. Regardless of whether planning commissioners are agents of the City, the comments of Commissioner Long, or any other commissioner, are irrelevant to the question of whether the City Council's decision-making process violated Kay's right to substantive due process. Even if the Court considered all the comments identified by Kay, the result would be the same.

the TCA, AR 4:75:1139, while Council Member Clark voiced concerns about maintaining the residential character of the neighborhood. AR 4:75:1126. Instead of arbitrary action, the City Council members' comments evidence serious deliberation as they discuss reasons Kay's permit application should or should not be granted. Surely, the City Council has a right to debate the merits of Kay's permit application without running afoul of substantive due process.

Elsewhere, Kay insists that the City commissioners and Council members decided Kay was a liar, based on false assumptions about alleged Getty Trust operations, and thereafter treated him with contempt, precluding any chance of a fair assessment of his antenna application. *See* AR 4:75:1129. The City Council did indeed debate whether Kay had a contract with the Getty Trust. AR 4:75 1129. Nothing in the record, however, rises to the level of treating him with "contempt" or establishes that council members formed any irrational hostility toward him based on these assertions. The City continues to contend that, in November 1995, the FCC issued the Getty Trust a license to use Kay's antennas for business purposes. It further contends the Getty Trust was licensed to use antennas on Kay's property and began using those antennas on November 27, 1995 to transmit on frequencies licensed to use antennas for commercial mobile radio services, including the 852.9625 MHz frequency which Kay expressly authorized. Kay initially submitted a sworn declaration to the City saying that "The Getty Trust obtained an FCC license to transmit on commercial frequencies from my location without my knowledge or permission.

AR 2:56:434 [lines 6-7].[19] Kay opined that "Getty must simply have been told by a "radio industry professional . . . of [his] home and radio transmitters located in Rancho Palos Verdes." *Id.* Later, Kay's counsel admitted to the City Council that Kay gave Getty permission to list Kay's property as a site on Getty's application for a commercial license. AR 5:83:1305. Indeed, the December 7, 1994 letter establishes that Kay had business discussions with Getty that could potentially have resulted in a lucrative business arrangement. The Court is skeptical, to say the least, that Kay, who clearly was interested in making money from the use of his antennas, would have forgotten he had entered into such an agreement with such a well-known entity as the Getty Trust. Indeed, it is not clear to this Court even now, after extensive briefing and discussion by both parties, precisely what commercial arrangements Kay actually had with Getty at any particular point in time. The City was justifiably skeptical about Kay's veracity concerning his actual and intended use of the property.

Moreover, as the City notes, other statements by these same Council members demonstrate fairness and professionalism toward Kay. On the last night of the public hearing, for example, Council Member Gardiner stated the matter should be continued until the City Council has had "a fair chance" to look at Kay's submissions in order for the

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19. The City contends that Kay's alleged lies about commercial use of the antennas is dispositive. The Court disagrees. The Court concludes there was "substantial evidence" in the record to suggest that Kay had lied. Therefore, if the City's position were legally correct, the Court would uphold the CUP. (The Court is not making a finding as to whether Kay actually did lie about this issue.)

decision-making process "to be absolutely fair." AR 5:83:1309. Elsewhere, Council Member Clark stated that his goal was to permit Kay to use the two antennas on his roof as he sought fit, while maintaining the residential character of the neighborhood. AR 5:83:1319. Mayor Pro Tem Stern stated that while he was troubled by Kay's candor, his decision "turns on other factors" as well. AR 5:83:1316. As further evidence of the extent to which City officials respected Kay's rights, Kay's own representative thanked the City's planning staff and praised them as "consummate professionals." AR 4:69:1003. While Kay dismisses these comments as "perfunctory professionalism" that does not waive Kay's right to object to the City's "arbitrary and irrational acts," Reply at 15, the Court sees them as some evidence that Kay's substantive due process rights were not violated. Kay simply has not proven to this Court that the Council's actions rose to the level of a substantive due process violation.

2. The City Did Not Violate the Equal Protection Clause.

The Equal Protection Clause mandates: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Kay admits he is not a member of a suspect class. Therefore, as long as the City has a "rational basis" for creating a classification, . . . the law passes the equal protection test." *Watson v. Proctor*, 161 F.3d 593, 599 (9th Cir. 1998).

Kay's first equal protection claim is that he was treated differently from Abrams, who was allegedly similarly situated. As the City notes, it was vehemently opposed to granting Abrams commercial use of his antenna. The Court doubts an equal protection claim can be based on an involuntary, court ordered action. In any event, the Court finds Kay and Abrams are not sufficiently similarly situated to compel a finding of an equal protection violation. Kay himself argues that his situation is different from Abrams'. He, contends: "Kay's [antenna] arguably had *less* of a visual impact than Abrams' . . . ." The Court agrees there is a difference in visual impact - and therefore, a difference between Abrams' situation and Kay's. Whether the impact is greater or less is not for Kay -- or for this Court -- to decide. As is by now obvious, Kay and Abrams think in terms of antenna *use*, while the City properly considers aesthetics. A five (or 20) mast structure is not aesthetically equivalent to a 52.5 foot tower. More importantly, the City notes that Abrams apparently lives in his residence while Kay does not. As discussed previously, there is substantial evidence supporting the City's conclusion that Kay purchased his residence simply to use it as an unoccupied base for his antenna business.

Kay has not proven that he is similarly situated to Abrams.

3. Ordinance 374U Does Not Constitute A Bill Of Attainder Or Ex Post Facto Law; Its Passage Does Not Violate Kay's Equal Protection Rights.

The parties agree 374U was a reaction to, and designed to address, Judge Wilson's ruling in *Abrams*.[20] Specifically, 374U prohibits the installation of more than one vertical mast per amateur rooftop antenna structure. AR 3:64:641. Kay argues that the City adopted 374U as an "urgency" measure to affect the appeal pending on Kay's CUP application, which was then scheduled to be heard in a few days. AR 3:66:737. Had the City adopted the amendment in the ordinary course of business, 374U would not have applied to Kay's CUP application. Kay contends at, assuming the ruling in *Abrams* applied to Kay, the City "arguably would have been forced" to grant Kay's application as to his entire 20 mast antenna structure (not just the five mast antenna structure), subject to reasonable conditions. Kay's Opening Brief at 39.

Although the new "urgency ordinance" banned the installation of all multiple antenna mast structures without first obtaining a permit, it "grandfathered" in all existing antenna structures – *except* those erected after June 1, 2001. AR :64:0641 [Section 3]. Based on sworn testimony of both Senior Planner Fox and Director of Planning Rojas, Kay is the *only* Rancho Palos Verdes homeowner who erected or modified his antenna structure after that date, i.e., *both* the "urgency" nature of 374U and the retroactive provision were

20. Though Kay refers to the ordinance as "eviscerating" the ruling, there is nothing inherently wrong in the City passing an ordinance in an attempt to address the impact of a court's ruling.

directed *solely* at Kay. (Fox Depo., Kay's Opening Brief, Exh. C, at 91:14 to 92:15; Rojas Depo., Kay's Opening Brief, Exh. E, at 119:7 to 120:7.)

a. Bill of Attainder

The Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. ART. I, § 9, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002), *quoting Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). "A statute that singles out individuals or groups by targeting their property may . . . be a bill of attainder." *Id.* at 672.

"Three key features brand a statute a bill of attainder: that the statute (1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial." *Id.* at 668. "Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder." *Id.* at 669. Only the first two factors need be discussed here.

The Ninth Circuit has established four non-exclusive guideposts "to aid in determining whether legislation singles out a person or class within the meaning of the Bill of Attainder Clause." *Id.* Courts must evaluate (1) whether the statute or provision explicitly names the individual or class, or instead describes the affected population in terms of general applicability; (2) whether the identity of the individual or class was easily ascertainable when the

legislation was passed; (3) whether the legislation defines the individual or class by past conduct that operates only as a designation of particular persons; and (4) whether the past conduct defining the affected individual consists of irrevocable acts committed by them. *Id.* No single factor is dispositive. *Id.*

Clearly 374U does not name Kay, but the class of persons affected by it would be "easily ascertainable": it is those City residents who erected certain types of rooftop antennas after June 1, 2001. It appears Kay was the only Rancho Palos Verdes homeowner in this group (though there are others who might have been affected if an earlier date had been chosen). The ordinance was passed in response to the *Abrams* decision and was deemed "urgent" specifically because of Kay's pending application. The City acknowledges that 374U was intended to apply to Kay's additional antennas. *See* AR 3:64:642; City's Trial Brief at 11-12.

The "past conduct" factor supports a finding of specificity when the date in the challenged statute targets an individual on the basis of a past act that others had not committed as of the date the statute was passed. *Id.* Courts may also consider the future potential of the statute to "encompass a larger class than the individual or group allegedly targeted." *Id.* That 374U will apply to every future homeowner wishing to erect amateur antennas detracts from Kay's specificity argument. *SeaRiver*, 309 F.3d at 671. Indeed, although Kay apparently was the only person then affected by 374U, its clear purpose was to address the very concerns the city had raised before Judge Wilson, and that Commissioner Long identified, AR 2:42:358, i.e., that

individuals would falsely claim to want antennas for amateur use as a means to avoid restrictions or denials of commercial permit applications.

Finally, the Court must consider whether the challenged statute "defines the specific class of persons affected by the 'irreversible acts committed by them.'" *SeaRiver*, 309 F.3d at 671 (internal citation and quotations omitted). Clearly no *irreversible* acts are involved here. Though no single factor is dispositive, the Court finds the "reversibility" of the conduct at issue to be a compelling factor favoring a finding of non-specificity. The Court need not decide the issue, however, as it concludes 374U does not inflict punishment.

A statute must inflict punishment in order to constitute a bill of attainder. *SeaRiver*, 309 F.3d at 673. In determining whether a statute inflicts punishment, courts must evaluate: (i) whether the challenged statute fails within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. *Id.* Courts may also consider "whether less burdensome alternatives would have achieved the same non-punitive purpose." *Id.* statute need not satisfy all of these factors to constitute a bill of attainder. *Id.*

Traditionally, bills of attainder sentenced the targeted individual to death, imprisonment, banishment, punitive confiscation of property, or otherwise erected a bar against employment or participation in specified vocations. *Id.* Kay argues that 374U falls within the historical meaning of

legislative punishment because it represents a punitive confiscation of property. Reply at 17. The City contends (1) economic loss does not fall within the historical meaning of legislative punishment and (2) 374U's limit on the number of amateur antennas cannot by definition amount to punitive confiscation. City's Trial Brief at 38-39. The Court agrees with the City.

Because the Ordinance does not provide for actual confiscation, Kay must necessarily rely on a theory that equates confiscation with economic loss. But, economic loss occurs only when Kay does exactly what the City accuses him of doing: constructing antennas allegedly for amateur use, while fully intending to use them for commercial purposes. If the Court takes Kay at his word, there can be no economic loss. In any event economic loss alone is not coterminous with punitive confiscation of property. *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992); *see also Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 692 (D. N.J.) (economic punishment does not fall within the historical meaning of legislative punishment).

Next, the Court inquires whether the challenged statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes." *SeaRiver*, 309 F.3d at 674. Even if the statute singles out an individual on the basis of irreversible past conduct, it cannot be a bill of attainder if it furthers a non-punitive legislative purpose. *Id*. Kay alleges that 374U does not further a non-punitive legislative purpose because it contains a retroactivity clause that applies only to one

individual. Reply at 18. The City claims that the non-punitive purpose of 374U is (1) to reduce visual blight that could occur if individuals erect an unlimited number of amateur antennas and (2) to control the potential explosion of commercial antennas in light of the Abrams decision. City's Trial Brief at 40.

Although 374U singles Kay out on the basis of past conduct, a quick review of photographs of the Indian Peak Residence, AR 1:36:212, establishes the non-punitive legislative purpose of avoiding visual blight. Aesthetic concerns lie at the root of zoning policy, *see Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989) ("preservation of the character and integrity of single-family neighborhoods" is a "legitimate purpose of planning and zoning"), and Kay does not dispute that a number of his neighbors complained that the Property was unsightly and did not conform with the residential character of the neighborhood. (Kay does contend, however, that he was in the process of fixing it up.) Indeed, if Kay had not had the five mast structure on his roof for several years -- lawfully -- this Court would have found that the City's aesthetic concerns were justified even as to those. Moreover, rather than targeting Kay's property only, 374U addressed the prospective risk of additional homeowners erecting antennas. In short, this factor supports a finding that 374U furthers a non-punitive legislative purpose.

One characteristic of a punitive statute is a legislative record that evinces an intent to punish. *SeaRiver*, 309 F.3d at 676. Courts must determine whether the legislative record is probative of non-punitive intentions or instead evidences an

intention "to pander to an inflamed popular constituency" and "assume the mantle of judge -- or worse still, lynch mob." *Id.* (citation omitted). Departure from established legislative procedure may indicate an improper purpose. *Id.*

Kay claims that numerous hostile remarks directed toward him and his counsel demonstrate a legislative intent to punish. Kay's Opening Brief at 41; Reply at 18. For the reasons addressed in the discussion of Kay's substantive due process claim, the Court disagrees. While the administrative record reflects a certain degree of hostility toward persons who claim to be interested in amateur use in order to obtain permission to erect antennas in residential neighborhoods, on balance, the record indicates that 374U was enacted with the non-punitive intention of furthering legitimate planning goals, rather than the intention of punishing Kay. Similarly, although Kay describes the conditions imposed as punitive, the conditions arguably reflect a legitimate attempt to ensure that Kay's long vacant property will in future be maintained in keeping with the residential character of the neighborhood. Thus, the conditions cannot be fairly described as a mere attempt to "pander to an inflamed popular constituency." *SeaRiver*, 309 F.3d at 676. In short, any hostility toward Kay reflected in the legislative record is not conclusive evidence of punitive intent.

In determining whether a legislature sought to inflict punishment on an individual, courts also find it useful to "inquire into the existence of less burdensome alternatives by which [the agency] could have achieved its legitimate nonpunitive objectives." *Id.* at 677, *quoting Nixon*, 433 U.S. at 482. Here the City Council certainly could have chosen a

date other than June 1, 2001 for application of the retroactivity provision, or otherwise increased the number of permissible antennas. Nevertheless, the City Council's decision appears to be rational and commensurate with its legitimate non-punitive goals. Therefore, the Court will "decline to assume the mantle of the legislature in determining the date that a statute must take effect, or in framing and quantifying the class that the legislation may permissibly affect." *Id.* at 678.

Because 374U does not inflict punishment, the Court finds it is not a bill of attainder.

b. Ex Post Facto

To determine whether a statute is an ex post facto law, courts must first "ascertain whether the legislature meant the statute to establish civil proceedings" *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citation and quotation marks omitted). If the legislature intended to impose punishment, then the inquiry is finished. *Id.* If, however, the legislature intended to "enact a regulatory scheme that is civil and nonpunitive," courts must "further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Id.* (citation and quotation marks omitted). Because courts must ordinarily defer to the legislature's stated intent, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (citation and quotation marks omitted).

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To determine whether a statutory scheme is civil or criminal, courts "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* at 93 (citation and quotation marks omitted). Courts should begin by examining the statute's text and structure, but "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Id.* at 94.

The City alleges that 374U is not an ex post facto law because the City Council's intention was to enact a civil non-punitive statute. City's Trial Brief at 43. Kay does not specifically address this issue. See Kay's Opening Brief at 42; Reply at 18-19.

The Rancho Palos Verdes City Council expressed its legislative intent in the text of 374U itself. *See* AR 3:64:642. The Council noted that the Abrams decision established "judicial precedent that could be used to allow the current exemption for certain amateur antennae to be used by individuals seeking to make commercial use of those antennae and profit thereby by adding more antennae and support structures on residential structures to the detriment of the surrounding residential neighborhoods and the public health, safety and welfare." *Id.* The ordinance explains that "[t]o avoid the substantial delay . . . and the corresponding adverse impacts to the public health, safety and welfare of the City's residents and the general public, . . . it is necessary for this ordinance to become effective immediately." *Id.* The text also suggests that retroactive application would ensure

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"that the current exemption cannot be misused by individuals seeking to make commercial use of amateur antennae, especially since one such application currently is pending before the City . . . ." *Id.* Thus, the text of 374U reflects the intent to deal rationally with a public policy concern, and "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Smith*, 538 U.S. at 93 (citation omitted).

Kay attempts to cast doubt on the non-punitive character of 374U by pointing out that any violation of the municipal code may be punished by criminal prosecution. Kay's Opening Brief at 42. Specifically, Section 1.08.010 of the RPVMC provides: "[a]ny person violating the Code is guilty of a misdemeanor, unless the violation or failure to comply is expressly stated by [the] Code to be an infraction or is subsequently prosecuted as an infraction in the discretion of the city attorney . . . ." 374U itself, however, does not provide for any procedures associated with the criminal process, nor does it establish penalties for noncompliance. *See* AR 3:64:641. The (remote) possibility that Kay could be criminally prosecuted for failure .o comply does not render 374U a criminal law. *See Smith*, 538 U.S. at 96 ("Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.").

In analyzing the effect of a challenged statute, courts examine whether the sanction: (i) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) comes into play only on a finding of scienter; (4) promotes the traditional aims of punishment (retribution

and deterrence); (5) applies to behavior which is already a crime; (6) has a rational connection to a non-punitive purpose; or (7) is excessive with respect to this purpose. *Id.* at 97; *citing Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). These factors are "neither exhaustive nor dispositive." *Id.* (citation omitted).

Misdemeanor charges for violation of local zoning ordinances have not historically been regarded as punishment. *See SeaRiver*, 309 F.3d at 673 (historical punishments include death, imprisonment, banishment, punitive confiscation of property, and bars to employment). In any event, it is clear from the record that Kay has regularly been in violation of various ordinances of the Rancho Palos Verdes Municipal Code. There is no suggestion that Kay or anyone else has ever had such a violation treated as a misdemeanor.

The statutory scheme does not impose any affirmative disability or restraint. *See Smith*, 538 U.S. at 99-100 ("If the disability or restraint is minor and indirect, its effects are unlikely to be punitive."). Although the possibility of criminal prosecution may prevent City residents from violating 374U, 374U does not reasonably have the effect of promoting the traditional aims of punishment. *See Smith*, 538 U.S. at 102. The ordinance does not prohibit behavior that is already a crime or otherwise require a finding of scienter. *See* AR 3:64:641. Most significantly, however, 374U has a rational connection to a non-punitive purpose, namely the prevention of the proliferation of antennas in the City of Rancho Palos Verdes. *See* AR 3:64:642; *see also Smith*, 538 U.S. at 102-03 (a rational connection to a nonpunitive purpose is the most significant factor for determination that a statute's effects

are non-punitive). Finally, possible misdemeanor charges for violation do not constitute an excessive punishment in light of 374U's nonpunitive goals. *See* AR 3:64:642.

In passing 374U, the intent of the Rancho Palos Verdes Council appears to have been to create a civil, non-punitive regime. Kay has failed to show by the "clearest proof" that the statute's effect is so punitive as to negate the City Council's intent to establish a civil regulatory scheme. 374U, therefore, does not violate the Ex Post Facto Clause of the United States Constitution.

c. Equal Rights

In this permutation of his equal protection argument Kay contends that he is not the only homeowner whose rooftop antenna structure fails to meet the requirements of 374U. As the retroactive aspect of 374U applies to his structure (because of its effective date), he claims he is treated differently from similarly situated homeowners. To establish his claim he refers only to photographs attached to the report of his expert, H. Clark Bell. This photos are inadmissible, and in any event would not prove his claim. Bell does not authenticate the photos other than to say that they were provided during discovery. Although his report mentions them, it is for another point -- not to establish that the homeowners are similarly situated to Kay or that their antennas do not conform to 374u or were in place before June 2001. Indeed there is nothing in the record from which the Court could conclude these homeowners were similarly situated. The photos are so poor the Court cannot even be sure that some of the homes depicted even have radio antennas, much less similar, non-conforming ones.

Where the plaintiff is not a member of a suspect class, a statute will not violate equal protection if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *SeaRiver*, 390 F.3d at 679, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). After viewing Kay's evidence (the photos provided by the City), the Court perceived an aesthetic difference among antenna structures. Even if Kay had established that 374U did not include others similarly situated, "'mere underinclusiveness is not fatal to the validity of a law' under the Fifth Amendment's guarantee of equal protection." 390 F.3d at 679 (citations omitted). In any event, that the Council "could have chosen an earlier or later effective date does not establish an equal protection violation." *Id.* at 680, *quoting United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("the fact the line might have been drawn differently at some points is a matter for legislative rather than judicial discretion").

The City has not violated the Equal Protection Clause.

d. Kay's "Taking" Claim Is Not Ripe.

The "taking" clause of the Fifth Amendment provides: "[n]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The purpose of the clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Before a challenge to an alleged taking may be brought in federal court, the claims must satisfy the ripeness requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). A challenge to an alleged regulatory taking is not ripe unless (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the claimant has sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. Thus, pursuant to the second prong of the *Williamson* test, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. If the state does not have a "reasonable, certain, and adequate provision for obtaining compensation" at the time of taking, however, the claim is instantly ripe. *Id.* at 194; *see also San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998). "A landowner who seeks to sue in federal court before seeking compensation from the state bears the burden of establishing that state remedies are inadequate." *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 827 (9th Cir. 2004) (internal quotation marks and citation omitted).

Kay appears to allege that ripeness is irrelevant because "ordinary takings cases" are not applicable to the present situation. Reply at 21. The City alleges that Kay's taking claim fails because Kay has not exhausted his state remedy for seeking just compensation. City's Trial Brief at 45.

Kay has failed to show that he pursued state administrative or judicial remedies to seek just compensation. *See* Reply at 21-22. Although Kay engaged in an extended series of dealings with the City regarding his CUP application, see Kay's Opening Brief at 9-22, Kay has not alleged that he ever sought compensation or losses resulting from conditions imposed on the CUP. *See* Reply at 21-22. Moreover, Kay has failed to prove, or even allege, that California lacks an adequate procedure for seeking just compensation. Id. For that reason, Kay's taking claim is not ripe.

5. Kay's Claim Under PRB-1 Is Premature.

PRB-1 is a Federal Communications Commission declaratory ruling, providing that "local regulations which involve placement, screening or height of antennas based on health, safety or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." *Id.* at ¶ 25 (emphasis added). PRB-1 preempts only those "local regulations that operate to preclude amateur communications . . . ." PRB-1 ¶ 24 (emphasis added). PRB-1 "promotes the federal interest in amateur radio operations rather than any individual operator's right to erect the antenna of his or her choice. *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991). PRB-1's reasonable accommodation standard requires that a municipality (i) consider a resident's antenna application, (2) make factual findings, and (3) attempt to negotiate a satisfactory compromise with the applicant. *Id.* Kay admits that the City considered his application and made

factual findings; he objects only to the City's alleged failure to negotiate a satisfactory compromise with him; Kay's Opening Brief at 45:16-19. Kay likens his situation to that of plaintiff in *Palmer v. City of Saratoga Springs*, 180 F. Supp. 2d 379, 385 (N.D.N.Y. 2001). According to Kay, the City has disregarded this third prong of the reasonable accommodation test and instead "engaged . . . in a strictly one-sided negotiation consisting of inflexible demands and the construction of hoop after hoop . . . to jump through." *Id.* In support of his contention, Kay cites the City's alleged "historical, demonstrable animosity" toward antennas in general and Kay's antennas in particular as proof that the City "would never allow a property owner to have more rooftop antennae than are exempt under section 17.76.20."[21] Kay's Opening Brief at 46:21-27.[22]

Kay's objection to the City's attitude toward antennas is premature, however, as the City has not ruled on how many

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21. Kay's argument that PRB-1 preempts this section is immaterial, as Kay has not yet applied for an amateur antenna permit.

22. Kay cites to a statement in *Abrams* and "hostility expressed by the City towards antennae in the *Abrams* case" as the sole support for his contention. But *Abrams* is a different case with different facts, most of which have not been provided to this Court. Even if the Court considers the few facts provided in the *Abrams* decision, it would establish that the City was hostile to a 52.5 foot tower in a different location. The Court declines to find the City would not act in good faith in an entirely different situation without giving the City an opportunity to act properly. The Court also notes that the testimony of the City's experts provided in support of his argument was given after this action was filed. Thus the City has not yet had an opportunity to consider that opinion.

amateur antennas Kay may have. The City never prohibited Kay's amateur-use antennas because Kay never applied for an amateur permit for the additional fifteen antennas he seeks to erect. In fact, the City specifically states in its trial brief that it would allow Kay at least five amateur antennas should Kay "avail himself of the procedures set forth . . . for seeking approval from the Planning Director or the Planning Commission depending on the height of the proposed antenna." Opposition Brief at 47. The City's Planning Director has the ability to approve amateur antennas "beyond the two exempt assemblies," so long as the proposed antenna meets specified height requirements. City's Trial Brief at 48. Kay's failure to apply for an amateur antenna permit is apparently based on his fear that the City's hostility to him and his antennas precludes fair adjudication of any application he might make.

Black letter law typically demands that an individual seeking judicial review of agency action exhaust all administrative remedies before seeking relief in a federal court. *See, e.g., Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1302-30 (9th Cir. 1992). In the present case, the City has explicitly prohibited Kay from erecting more than two antennas for commercial use. AR 5:84:1340-41 [condition 2]. It has not yet ruled on his amateur antennas. Kay has not exhausted his administrative remedies.

Kay's remaining arguments are thus inapposite. Kay asserts that, although the CUP demands only that Kay remove "roof-mounted antenna" but permits him to locate as many antennas inside of his house as he wishes, AR 5:84:1342 [condition 11], interior antennas are far less effective than

exterior antenna. AR 4:76:1166-67. Kay further notes that the only possible interior location is the home's master bedroom but that Kay was only permitted to broadcast commercially on the condition that the house be occupied. If, after applying for an amateur antenna permit, the five permissible roof-top amateur antenna[23] (in addition to interior antenna Kay may choose to have) do not provide Kay with reasonable accommodation for amateur purposes, he may then, and only then, appropriately pursue his case in federal court.

As the City notes, moreover, expert Richter's testimony rests on the mistaken premise that the City has already stated that Kay may have only two amateur antennas. Because this is not the case, Richter's testimony that two antennas are insufficient has no bearing on the present case. In addition, the aesthetic similarity of amateur and commercial antennas is not dispositive, as other considerations, such as the health or safety issues suggested by PRB-1, may direct the City's decision. The Court will not attempt to predict on what basis the City may make its ultimate ruling.

Of course, if the City fails reasonably to accommodate Kay's amateur antenna use, once he files an application, the City *may be* in violation of PRB-1. The Court will address that issue, if necessary, when properly presented, rather than usurp the City's permit-granting role. Indeed, PRB-1 "does not contemplate the outright invalidation of city zoning authority . . . ." *Howard*, 937 F.2d at 1380. Barring Kay's exhaustion of the remedies, his PRB-1 claim is not ripe for

23. These will now be allowed to remain in accordance with the instant order.

review. *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987) (plaintiffs' taking, equal protection and due process claims were not ripe for review where "the City has not yet made a final decision regarding the property"); *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 379-80 (9th Cir. 1988) (property owners' takings, equal protection and due process claims not ripe because the "City reached no final and authoritative determination as to how the [zoning] ordinance applied"). The Court simply cannot determine that the City has violated PRB-1 based on what it might do according to some unsubstantiated alleged grudge.

In any event, Kay's requested relief is inappropriate. He apparently attempts to bootstrap his PRB-1 argument into an order that the City approve all of his amateur antennas for **commercial** use. While that might be the legal effect, if this Court's present ruling and the *Abrams* decision are correct, that is an argument for another day with further briefing. PRB-1, by, its express terms, refers only to **amateur** antenna use and does not address **commercial** use at all. Insofar as Kay attempts to apply PRB-1 to **commercial** antenna, he misapplies the agency ruling. Insofar as Kay attempts to apply PRB-1 to **amateur** antenna, he has failed to exhaust his administrative remedies as required in order to seek relief in this Court.

D. Remedies Pursuant to 42 U.S.C. §§ 1983 and 1988

Kay asks that the Court award him damages pursuant to 42 U.S.C. § 1983 and attorney's fees pursuant to 42 U.S.C. § 1988.

The Ninth Circuit recently held that section 1983 damages are available for violations of the TCA, *Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004), finding that although "the TCA contains no remedies at all," awarding section 1983 damages is more consistent with "the presumption in favor of § 1983 remedies." *Id.* at 1098. Kay may submit his request under these sections by regularly noticed motion.

V. CONCLUSION

For the reasons stated, the Court finds there was not "substantial evidence contained in a written record" to support the Council Resolution. A writ of mandate will issue compelling the City Council of the City of Rancho Palos Verdes to issue a new resolution allowing James A Kay, Jr. to use his five mast antenna structure for commercial purposes, subject to reasonable conditions. Kay may seek fees and costs in a separately noticed motion.

On all other issues the Court finds in favor of Respondents.

Kay is ordered to submit a proposed Judgment within ten days of the date of this Opinion and Order. Respondents shall have ten days to submit any objections to the proposed Judgment.

IT IS SO ORDERED.

Dated: July 12, 2004

s/ Dale S. Fischer
Dale S. Fischer
UNITED STATES DISTRICT JUDGE

APPENDIX B — EXCERPTS FROM CITY OF RANCHO PALOS VERDES PLANNING COMMISSION MEETINGS

CITY OF RANCHO PALOS VERDES
PLANNING COMMISSION
REGULAR MEETING
NOVEMBER 13, 2001
ITEM NO. 3

CHAIRMAN LYON: Okay, next item is Item Number 3.

COMMISSIONER LONG: When do we get comments from the public on non-agenda items.

CHAIRMAN LYON: Pardon?

COMMISSIONER PAULSON: Comments from the. . . .

COMMISSIONER LONG: Public on non-agenda items.

CHAIRMAN LYON: Oh we covered that already.

COMMISSIONER LONG: Oh we did already?

CHAIRMAN LYON: Yeah, yeah. There were none.

COMMISSIONER LONG: Oh okay, that was it.

COMMISSIONER PAULSON: We were moving fast in the beginning.

[Laughter]

COMMISSIONER PAULSON: You stepped out of the room . . . .

[Laughter]

COMMISSIONER LONG: I stepped out the room briefly so that's fine. Good.

CHAIRMAN LYON: Okay.

COMMISSIONER LONG: That we're done startles me.

COMMISSIONER VANNORSDALL: Never leave the room.

* * *

COMMISSIONER CARTWRIGHT: So it would seem to me that if we were to narrow our discussion to the five antennas that were up there when the application was filed, there were antennas on the second level that, we can certainly discuss what should happen to those, and then it seems to me that we need to make certain that the structure looks like and feels like a single family residence and fits in with the character of the neighborhood. These other 16 antennas that are up on the roof, as far as I'm concerned, unless there are some compelling arguments on the part of the other Commissioners, I don't see where they fit into this application. It seemed to me that that's a violation of our Development Code and they should be taken down.

COMMISSIONER LONG: I think we should probably include a fact-finding in a amended resolution saying what

John just said. I guess to start off, I mean, to maybe go through, my thought was to go through and maybe we could take it paragraph by paragraph, starting on page 3 of 9, Section 1, subparagraphs. It seems to me perhaps we should have a section A, which would be just what John just said, that we find that this application applies only to the four antennas that actually existed and were depicted in photographs in the application. Am I getting the number wrong?

CITY ATTORNEY LYNCH: There's five.

COMMISSIONER LONG: Five.

SENIOR PLANNER FOX: There were five existing.

COMMISSIONER LONG: Okay, five. The five antennas that were in the pictures depicted with the application, and that the other antennas to the extent they were existent on the property, do not fall within any exemption and are not the subject of this application. It seems to me we're going to want to modify proposed finding A, where it says there is existing foliage which screens the roof-mounted antennae from many surrounding residences. I would say, the existing foliage does not adequately screen the roof-mounted antennae from many surrounding residences in the neighborhood, and then, I would say, however, conditioning approval upon relocation of all antenna facilities, and I would add a sentence at the end of A, however, conditioning approval upon removal of all antenna facilities to the interior of the house eliminates any adverse visual impacts. Let me see.

CITY ATTORNEY LYNCH: I might suggest that you go ahead and allow the two, in that there's one that looks like a television antenna remain. Leave those two up there, because there is an exemption for two of that type of antenna.

COMMISSIONER LONG: Okay, and then maybe we should also, in the proposed amendment. . .

CITY ATTORNEY LYNCH: Put everything else inside.

COMMISSIONER LONG: . . . that John was talking about say that, other than those two, the others are not exempt, and that we're removing those.

CITY ATTORNEY LYNCH: And putting them inside, right?

COMMISSIONER LONG: Right. Okay. I would go next to, well, okay, actually C, in approving the subject use at the subject location, there will be no significant adverse effect on adjacent property or the permitted use thereof because the conditions of approval of the project will require reductions of the existing exterior antenna support structure and array. It's a part of the basis of our factual finding. And C is going to be the conditions that we're going to be imposing. It would seem appropriate to leave all of the other conditions and findings in place in C.

COMMISSIONER PAULSON: Tom, a question. I have a question first. City Attorney and staff, if we do what is being proposed on this specific one, where we're saying put everything inside other than two, under the City's current Development Code, if they want to put up antennas exterior-

wise, after we were to take such an action, strictly on the outside, based on an amateur antenna situation, do they have to come back to the City?

COMMISSIONER LONG: No they'll already have their two, that's why Carol made the modification.

* * *

CITY ATTORNEY LYNCH: I'm sure the three of us will work together.

CHAIRMAN LYON: And are we going to have it available to us before our meeting Thursday night.

CITY ATTORNEY LYNCH: Yes.

COMMISSIONER LONG: I am going to be looking to have as many conditions as we had for Longpoint.

CITY ATTORNEY LYNCH: I'm sorry.

COMMISSIONER LONG: Just kidding. As many conditions of approval as we had for Longpoint. You know, how many were there, sixty-three.

CHAIRMAN LYON: More than that.

CITY ATTORNEY LYNCH: Keep going.

COMMISSIONER LONG: One hundred.

COMMISSIONER PAULSON: It was a hundred.

COMMISSIONER LONG: When the conditions are done you can deliver both volumes of them to my office.

CITY ATTORNEY LYNCH: We can email them.

COMMISSIONER MUELLER: I think as part of those conditions took, I would like to see that thing on the roof, that pipe, disappear. I don't think that's necessary to support basically two antennas.

SENIOR PLANNER FOX: You mean the thing that looks like a big dryer vent?

COMMISSIONER MUELLER: Yes. That's to support the entire array.

* * * *

Appendix B

CITY OF RANCHO PALOS VERDES
PLANNING COMMISSION
ADJOURNED MEETING
NOVEMBER 15, 2001

Adoption of Resolution for Conditional Use Permit No. 230 and Environmental Assessment No. 744; 26708 Indian Peak Road

CHAIRMAN LYON: I guess there aren't any comments on the agenda. This evening there is one item on the agenda. Unless there is an objection, we'll approve the agenda. Are there any communications?

DIRECTOR ROJOS: Yes, I'll let Carol handle that.

CITY ATTORNEY LYNCH: We did pass out this evening a revised resolution and we provided a redline copy to the Commission where we made some additional changes today to the resolution. I have also provided a copy to the applicant's representative who is here, and if the other member of the public would like one, we also have an additional copy. So, and we passed this out before the meeting, so we would be asking the Commission to take action on the revised resolution that was passed out tonight.

CHAIRMAN LYON: Are there any questions from the Commission? OK, motion to proceed with the consent calendar items, and do we need a staff report? As far as I'm concerned, we can waive it.

Appendix B

CITY ATTORNEY LYNCH: Basically, we attempted to incorporate the directions that were given by the Commission at the meeting two nights ago.

CHAIRMAN LYON: And it's clearly stated that that's what we've got. So, let's . . .

CITY ATTORNEY LYNCH: We have two speakers.

CHAIRMAN LYON: We have two speakers. I guess the first item of business, unless there are questions . . .

CITY ATTORNEY LYNCH: You closed the public hearing. At this point, the public hearing is closed and the speakers can certainly comment on the text of the resolution, but this is not reopening consideration of the item. It's just adoption of the resolution memorializing the Commission's actions.

* * *

DIRECTOR ROJAS: Two.

CITY ATTORNEY LYNCH: Two. Which is the garage.

SENIOR PLANNER FOX: The garage would be the required parking.

CHAIRMAN LYON: I made a comment at some point that I'd like to use the word "dedicated."

COMMISSIONER LONG: No I said, yeah, I said exclusively.

CHAIRMAN LYON: Well exclusively would preclude anyone else from ever parking in the driveway.

COMMISSIONER LONG: That's right. That's. . . .

CHAIRMAN LYON: I have a problem with that.

COMMISSIONER LONG: That's what it means.

COMMISSIONER PAULSON: I don't know if you mean that, Tom.

COMMISSIONER LONG: No, actually, that is exactly what I mean. Because then they're being required to maintain two spaces for the residence, and two spaces for the service vehicles, so that at no time when the service vehicles are visiting will they ever have to park on the street.

COMMISSIONER PAULSON: You just qualified your statement. You said at no time when they are visiting. I'm concerned that when they're not visiting, you're saying somebody can't park their car there.

COMMISSIONER LONG: Well yeah, the concern I have is that someone will park their car there and. . . .

COMMISSIONER PAULSON: Then they're in violation if they park on the street.

COMMISSIONER LONG: Oh yeah, because it says, all service vehicles related to maintenance of the commercial antenna shall be parked off-street. Okay, so then no more

than two service vehicles are allowed in the same time. Two off-street parking spaces. . . .

* * *

COMMISSIONER LONG: Right.

CHAIRMAN LYON: This . . .

COMMISSIONER LONG: This approval of commercial antennas in the interior allows two exterior masts because it has restrictive conditions. In other words, it's still O.K.

CITY ATTORNEY LYNCH: I have to say, the more we talk about this, the more uncomfortable I am with it because it seems to me that in addition to the enforcement issue, we are walking into a potential argument that we are going too far under the Telecommunications Act and PRB 1 and the balance that has to go under PRB 1. I hadn't even thought about this until now. Under PRB 1, we have to use the least restrictive means possible to regulate amateur antennas. By getting into this issue, we are walking into a problem.

COMMISSIONER LONG: Well, but if he is going to sue us on the grounds that he wants to really use the property for more amateur antennas. Fine, so be it. Then we will find if this use maybe really is amateur. I mean my inclination is if we have to allow commercial structures all over the roof, and face more people who come in like this guy and Abrams who lie to us and tell us that they are ham radio buffs and they are really commercial operators, my inclination would be to just deny all the applications and tell them all to go to

hell and let them sue us.

[LAUGHTER]

CITY ATTORNEY LYNCH: Which undoubtedly will happen. O.K. I will be quiet now. I have said this every way I can think of, so . . . .

CHAIRMAN LYON: Well, Carol, . . .

COMMISSIONER MUELLER: I'm glad you here to hear that statement, myself.

CHAIRMAN LYON: Carol, you raised a good point, and are we doing anything in this paragraph that affects your position in that regard?

COMMISSIONER PAULSON: She was not addressing this paragraph. She was addressing the decision, the basic decision.

* * *

CHAIRMAN LYON: O.K. Then why are we not telling Mr. Kay to locate his antennas up on Abrams' property?

CITY ATTORNEY LYNCH: Because, right now, Mr. Abrams doesn't have a CUP to operate commercially.

COMMISSIONER LONG: Right. That's not an available site. And it won't be when we get a favorable termination of his lawsuit. Hopefully.

CITY ATTORNEY LYNCH: Hopefully.

COMMISSION LONG: But my comment on 9 was almost going to be, I think B is too vague, "negotiate in good faith." I would say, "agree to co-location as reasonably requested by the City," if we could do that.

CITY ATTORNEY LYNCH: Well, the trouble with that is that there is always an issue about separation and distances in order to avoid interference and if they show that they can't reasonably accommodate the other user, we can't then require them to do something that interferes with their own transmissions.

COMMISSIONER LONG: Well, but that's why I say, "as reasonable requested by the City." In other words, the thought is "good faith" is kind of a different standard. "Good faith," they could say, well, yeah, maybe they could have located an antenna here, but, you know, we want a lot of money and they weren't willing to pay it.

COMMISSIONER PAULSON: Which is part of the argument for [unintelligible].

COMMISSIONER LONG: Yes. Exactly. And I would kind of like to modify 9B to say that they will, instead of saying "negotiate in good faith for shared use by third parties," "agree to whatever shared used by third parties is requested by the City."

CITY ATTORNEY LYNCH: I don't like that.

COMMISSIONER LONG: "Is reasonably requested by the City."

CHAIRMAN LYON: Well, we are quoting directly from our Code using these words, and I think that we shouldn't deviate from that.

COMMISSIONER LONG: Then, I will defer.

* * *

PAULSON: See, that's my concern, I don't know whether we have the right to dictate, even in this situation, much of the appearance of the roof.

CHAIRMAN LYON: I don't think we need to . . .

COMMISSIONER PAULSON: We don't necessarily tell people to put drapes, curtains, blinds . . . .

COMMISSIONER LONG: Well, you say we don't require it in vacant houses. Do we require, is there anything in the Building Code. This is not going to be a vacant house.

CITY ATTORNEY LYNCH: No. There's no requirement about . . .

COMMISSIONER LONG: . . . even when they reside. O.K. Then fine. We are requiring whatever we are requiring for a residential house.

CITY ATTORNEY LYNCH: O.K. So we take out C. All right.

CHAIRMAN LYON: I guess I understand the reason why B is in there, really for the same reason A is in there, but we don't really require landscaping in anybody's front yard.

COMMISSIONER PAULSON: Well, that's true, but there is _____.

CHAIRMAN LYON: We do, oh, good. I didn't know.

COMMISSIONER LONG: We are going to go look at your front yard. Don't look at mine. I'm having it relandscaped right now.

CHAIRMAN LYON: Number 19, I suggest, do we say 90 days? I think that's too stringent. I would suggest 6 months. Even that is difficult, because we are requiring him to have either himself or some other person occupying that property within 6 months.

COMMISSIONER PAULSON: Well the planner, Frank, for the applicant says they will have somebody in the house.

COMMISSIONER LONG: They didn't ask for six months to do. I think three months is ample.

CHAIRMAN LYON: What if he wanted to rent?

COMMISSIONER LONG: Well, then he can rent. I mean, I can't imagine some . . .

CHAIRMAN LYON: You can put an add in the paper and put it in . . .

COMMISSIONER LONG: Given the current rental market, I don't think he'll have any trouble.

COMMISSIONER PAULSON: Well, why does he have to it in 90 days if he [unintelligible].

COMMISSIONER LONG: And show that he's . . .

CHAIRMAN LYON: My question is, is it unreasonable? That's my only concern. If it is not unreasonable, then I am O.K. with it.

SENIOR PLANNER FOX: Their attorney did state last night on the record that the addition will be done in six weeks.

COMMISSIONER LONG: When did he say that?

SENIOR PLANNER FOX: Tuesday night, on the record, whatever night it was.

CHAIRMAN LYON: And, the second and third line "shall be occupied by the applicant." I don't think so. I think we want to say "owner."

SENIOR PLANNER FOX: Well, the owner is the applicant.

CITY ATTORNEY LYNCH: The owner is the applicant.

CHAIRMAN LYON: Yes. But sometimes, the applicant is let's see, an architect, or property manager and, you know, . . .

CITY ATTORNEY LYNCH: We can say owner.

SENIOR PLANNER FOX: We can say owner.

CHAIRMAN LYON: Just so it is clear.

SENIOR PLANNER FOX: Yes.

CITY ATTORNEY LYNCH: Or someone chosen by the owner. Let's change it then to owner.

* * * *